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No. 3253

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this Complaint,
Appellees.

BRIEF FOR APPELLANTS.

R. T. HARDING,
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Index to the Principal Matters Discussed in This Brief.

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BRIEF FOR APPELLANTS.

General Statement of the Litigation.

This suit in equity, ascertaining its jurisdictional basis in diversity of citizenship, was instituted in the District Court at San Francisco by W. S. Overton against the Presidio Mining Company, a California corporation, and W. S. Noyes, B. S. Noyes, L. Osborn, J. W. F. Peat and L. M. Doherty. The suit concerns itself with the history, property and affairs of the Presidio Mining Company; the property involved is mining property of a character quite conjectural; and the fluc-

tuations so often encountered in mining history, are here reproduced, in verification of the experience of the courts that "there is no class of property more subject to sudden and violent fluctuations of value than mining lands" (*Patterson v. Hewitt,* 195 U. S. 309, 321; *Wall v. Anaconda Copper Mg. Co.,* 216 Fed. 242—affirmed sub nomine, *Wall v. Parrott Silver & Copper Co.,* 244 U. S. 407).

We have stated that the suit was instituted by W. S. Overton, and in fact, the suit is essentially a "one-man case". The original bill of complaint asserts the complainants to be "W. S. Overton and Carl A. Martin, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this complaint"; and in paragraphs I, IV, V and XII, it purports to give certain alleged information about "said complainants and also said other minority stockholders, on behalf of which said complainants and said other minority stockholders this action is brought". When we turn to the amended bill (40), we observe that all reference to any other stockholder than Overton and Martin has disappeared from the title of the case, and that the suit is now by "W. S. Overton and Carl A. Martin" only; we observe, also, that in par. X (44) it is stated that the minority stockholders are not made parties because out of the jurisdiction, that the relief sought is of "common interest" to them, and that the suit is brought "for the benefit of all said stockholders, and for any who may hereafter desire to unite herein"; but no reason is stated to explain why, though without the jurisdiction, these minority stockholders, in a matter

of "common interest" to them, could not have become parties if they really sympathized with the purposes of the bill. This amended bill attaches in Exhibit A (83) a list of these absentee stockholders, followed by the ambiguous statement (84) "W. S. Overton, et al., 22,753 shares"; no statement is made as to the identity of those concealed by the Latin curtain; from paragraph IV, we learn (42) that Overton's stockholdings aggregate only 11,353 shares out of a total capitalization of 150,000 shares; and there is nothing in this record that we are able to recall, which establishes the remaining 138,647 shares to be in sympathy with the complaints or the purposes of the pleading. When we turn to the supplemental bill (226), we do not find the situation improved; the sole nominal complainants are still W. S. Overton and Carl A. Martin; although this supplemental bill is asserted to treat of matters ascertained and proceedings occurring after the filing of the original and amended bills (par. 1), and although five and one-half months intervened between the filing of the amended and supplemental bills, yet not a single other stockholder appeared to lend assistance or give comfort to the complainants; and from paragraph X, it quite clearly appears that the inauguration of this litigation is to be traced to Overton as the hostile protagonist, but not to Martin. Nor is any alteration of the situation discoverable in the amendments to the amended bill (239) or in the amended prayer of the amended bill (285).

We have said that this suit was instituted by Overton, and that it is a "one-man case", and we think the criticism well founded. In his interlocutory decision, the

learned judge of the court below declared the acquisition in the name of William S. Noyes of Section 5 to be "the main matter for consideration in the case"; this acquisition occurred in 1912-3, prior to October, 1913; any stockholder who retained the slightest interest in the affairs of the company could readily have ascertained the fact of this acquisition, prior to October, 1913, if he really desired to do so; in October, 1913, the fact of this acquisition was made known to every stockholder through the annual report of 1913, produced upon the hearing below by Overton as Complainant's Exhibit 17 (601; quoted from at p. 628-631); and yet, from October, 1913, at least, to July 26, 1915, when the original bill was verified by Overton (31) and filed (38 *ad finem*), notwithstanding the general publicity given to the fact of this acquisition, the solitary stockholder who thought he was entitled to a grievance, was Overton; Martin was the veriest blank cartridge, *vox et praeterea nihil,* inactive and uninterested, apathetic as though wrapped in the mystery of folded sleep; he never visited the mine; he never examined a book, document or report; he never signed or verified a pleading; he never made an affidavit; he never attended court; he never testified as a witness or by deposition; he never contributed a penny to the expense of the litigation, never engaged independent counsel, never procured the attendance of a solitary witness, never exhibited even the faintest approach to personal activity, and never displayed the slenderest shred of interest in the controversy—the case is essentially a "one-man case".

The amended bill asserts that the relief sought by it is of "common interest" to those that it is pleased to describe as the "minority stockholders", and that the suit is brought "for the benefit of all said stockholders and for any who may hereafter desire to unite herein"; but, if we are to appraise the attitude of men by the indications of their conduct, this "interest", instead of being "common" to these "minority stockholders", is restricted to a single individual; and in so far as concerns the "desire to unite herein", it is to be observed that not another stockholder has given expression to a "desire to unite herein", or has intervened, or in any visible manner taken sides with the solitary individual who is actuated by the inequitable motive of rule or ruin, and who is looking forward with eager avidity to "control the management", as he discloses his purpose in that "confidential" communication of July 29, 1915—three days after this suit was brought—in which he bears witness to the fact that Mr. Gleim, the mine superintendent, "is an honorable and efficient official and is excluded in *my complaint* of the management" (621-624). This significant lack of "common interest" on the part of these so-called "minority stockholders", this aloofness, this apathetic failure "to unite herein" with this solitary complainant, this complete non-intervention even in a nominal way, pointedly suggests the natural inference that the stockholders of this company, other, of course, than Overton and perhaps his wife, do not disapprove of the administration now being attacked; and the following language from a recent opinion fortifies the position that the failure of a single other

stockholder to take advantage of the situation and "unite herein", not only raises no inference unfavorable to these defendants, but, on the contrary, justifies an inference favorable to them and to their administration:

> "That upon this branch (receivership) of the case insolvency is a jurisdictional requirement is so well settled in this state as to avoid the necessity of citation in support of it. A careful examination of the papers fails to convince me that the internal dissensions between the officers of this company and its stockholders have reached any such point as to require the intervention of this court. Manifestly, the present board of directors are supported by a large majority of the stockholders. Out of a par value of $267,000, only $60,000 approximately have intervened and asked to be permitted to be made parties complainant with the original complainant, and the presumption is that the residue, amounting to $200,000, are in sympathy with the management of the board of directors. This important fact cannot be overlooked in determining the question whether the dissensions in the company have reached the point demanding interference. Such a contest as this, provoked by a minority of stockholders, would constantly arise if the court should say that the protest of every dissatisfied stockholder was a basis for such internal dissensions as to warrant a receivership."
>
> *Stokes v. Knickerbocker Inv. Co.*, 61 Atl. (N. J. Eq.) 736, 738.

And similar views are thus expressed in a Federal decision:

> "Apart from the considerations hereinbefore discussed in connection with the prayer for a receivership, including the stipulation of October 28, 1908, there is the fact that, although the complainant sets forth that the bill is filed 'for herself and in behalf also of other stockholders of the defendant company in like manner aggrieved', no other stockholder has either intervened or applied for leave to intervene in the case. The complainant stands alone

> as the complaining party. Yet this court having jurisdiction of the subject matter and over the parties as they now stand on the record by reason of diversity of citizenship and the amount in controversy, any other stockholder by virtue of his stock-ownership and regardless of his citizenship or the value of his stock, was entitled to intervene by leave of the court. That no stockholder has sought to intervene justifies, in the absence of evidence to the contrary, an inference, by no means conclusive of the case it is true, that the other minority stockholders either do not view the contract of purchase as unfavorably as does the complainant or believe that the setting aside of that contract under existing circumstances would be more detrimental to than promotive of their interests as stockholders. Further, there is no evidence that of the minority stockholders, other than the complainant, more than a small proportion in number or amount, sympathize with the purpose of the bill."
>
> *Carson v. Allegany Window Glass Co.,* 189 Fed. 803-4.

Bearing in mind the last remark of the learned judge who wrote the opinion just quoted from, it may not be improper to observe that in the instant cause no pretense whatever is made that the majority stockholders of this company "sympathize with the purpose of the bill"; any such pretense would be shattered by a reference to the answers; and there is no proof whatever in this record to establish the proposition of fact that any other "minority stockholder" than the author of the "control the management" letter, and perhaps his wife, actually does really "sympathize with the purpose of the bill". We respectfully insist that this is essentially a "one-man case", that it is designed to further the personal desires of a single individual only, and that it does not reflect the views or wishes of the stockholders generally.

The pleadings on behalf of complainants include the original, amended and supplemental bills, together with certain amendments of the amended bill and its prayer. In a general way, the original and amended bills are similar; they count upon the same asserted grievance; and, equally in a general way, they seek the same relief. This original bill need not, however, detain us a great while, because, as a pleading, its importance disappeared. After it was filed, and when an application for the appointment of a receiver, and for an injunction *pendente lite,* together with a motion to dismiss, came before the court, the application for the receivership and injunction was denied, and the motion to dismiss ordered granted unless within twenty days an amended bill should be filed "stating a case for the granting of equitable relief"; and in thus disposing of the original bill, Dooling, J., said:

> "The bill here does not show that the property bought by defendant Noyes was so bought with the money of defendant Presidio Mining Company. Nor does it show that the lease between said defendants is not a profitable one for the mining company. Nor does it show that defendant Noyes is not the owner of the leased property, or that the defendant company has any legal or equitable interest therein. The most that can be said of this bill is that it avers the payment of extravagant salaries to its officers." (39)

In this manner, the original bill ceased to perform any function as a pleading, but did not cease to possess evidentiary value as an admission under oath against interest by Overton (*Pope v. Allis,* 115 U. S. 363; *Coward v. Clanton,* 79 Cal. 23; *Kincart v. Shambrook,* 128 Pac. (Oreg.) 1003). In this bill, for example, Overton

takes the position that a resulting trust arose in favor of the Presidio Mining Company as to Section 5, alleging in plain terms that though William S. Noyes acquired the section, yet the consideration was furnished by the company. Thus, after referring to the resolution awarding $45,000 to Mr. Noyes, the bill, among other things, charges

> "That said Wm. S. Noyes used a part of said bonus to purchase said entire Section 5, or, as it is otherwise known, the Silver Hill Mill and Mining Company, and said orators aver, on information and belief, that the entire price of said Section 5 was not in excess of the sum of $25,000, and that in order to secure the payment of said bonus the said Wm. S. Noyes not only applied the earnings of the company to payments, but he borrowed money on the company's credit to pay the first payment thereon." (21)

We shall hereafter notice the change of front as to this matter when we reach the supplemental bill.

And this original bill not only proceeds upon this theory of resulting trust, but it contains a certificate of good character so far as concerns the actual business of the mining carried on by the company. In paragraph XV, we are told that the mine and mill and appurtenances upon the company's property

> "Are handled with a high degree of efficiency and are in capable hands and management" (22);

and in paragraph XVI, we are informed that

> "On his way back east, said W. S. Overton stopped at the said Presidio Mine in Texas, and then and there first noticed the excellent equipment of said plant, and the organization and efficiency of the employes and the operations of said mine and mill." (24)

This confession does, we think, eliminate all claim of mining mismanagement and forever estop Overton in that respect; but when he came to file his amended and supplemental bills, he forgot to repeat these commendations of the mine management. At all events, these statements were not repeated in his subsequent pleadings, and it thus became necessary for defendants to put in this original bill as evidentiary matter to negative any inference of mismanagement at the mine, or of a desire by Mr. Noyes to wreck the company (929). Truly, as the local Supreme Court puts it, the human memory is "treacherous" (*Thompson v. Toland,* 48 Cal. 99, 115); and not infrequently this treachery is augmented by desire.

An amended bill was filed, and it sought to renew in substance the grievance adverted to in the original bill, plus such modifications of the allegations as might enable it to evade the criticisms of Judge Dooling. As is usual in cases of this type, this amended bill is exceedingly verbose and repetitious; it is stuffed with epithets; and it is not without its full share of that clamant denunciation so common in this species of litigation. Since Mr. W. S. Noyes was the principal object of Mr. Overton's antipathy, it would be extraordinary were omission made to advise us that he "dominated" and "controlled" stockholders, directors and company affairs (45): Mr. Noyes never negotiated, but he "conspired and negotiated" (46); the officers and directors of the company "did wilfully, fraudulently and unlawfully, and in violation of their obligations and duties as such directors, officers, agents and employees of said

company, conspire together for the purpose of defrauding said company, and of enriching themselves personally at the expense of said corporation", etc., and in pursuance of said "conspiracy", and as a part of "said fraudulent and unlawful agreements", did, "fraudulently, unlawfully and inequitably, and to the prejudice, detriment and financial loss of said corporation", not perform, but "commit and perform" certain enumerated "acts and deeds" claimed to be fraudulent (46-7); and so, too, with the stockholders themselves who, at their stockholders' meeting were "conspiring and confederating together for the purpose of defrauding and cheating your orators" (53); the officers and directors, it appears, aided and abetted W. S. Noyes "in his schemes and with guilty knowledge", in order to "cheat and defraud" complainants (56-7), and fraudulently conspired to "deceive" complainants (62), and "disregarded and violated their duties" (65), were "false and untrue" to their trust (66), gave to Mr. Noyes "the connivance and assistance of his relatives, agents, tools, co-conspirators and subordinates" (66), and were "parties to his plans for defrauding and mulcting said Presidio Mining Company" (67); the salaries paid to the San Francisco officers and board of directors were "enormous" (68); the practical operation of the lease of November 19, 1913, is "a most grievous and illegal fraud" (70); the company has failed of its purpose "because of the fraudulent mismanagement and misappropriation of its funds" (72); and the defendants have employed "chicanery and deceit", have "looted" the treasury, have "plunged the corporation deeper into

debt'' (76), and have been engaged in ''defrauding and pillaging'' (77).

Such are some of the flowers plucked at random from this rhetorical garden; but the rhetoric, as the impatience of the courts attests, is ''full of sound and fury, signifying nothing'', and ''however effective on the stump and curb, it is of no impressiveness in court''. It seems to be forgotten that ''epithets do not make out fraud'' (*Kent v. Lake Superior Canal Co.,* 144 U. S. 75, 91), and that even in those cases wherein the very facts constituting the fraud are actually set forth, still, the facts themselves ''gain no new force from the vituperative epithet'' (*Jaster v. Currie,* 198 U. S. 144, 147). It seems wholly to have been overlooked that such general averments as that directors were ''controlled by'', or were ''mere instruments in the hands of'' majority stockholders, do not overcome the legal presumption of fairness and good faith; that an averment that complainant is ''advised and believes that there is a secret understanding and agreement by and between the officers and majority of the board of directors'' to do an act complained of, amounts to nothing; the allegations that a defendant has arbitrarily and wrongfully manipulated the affairs of a company, are mere conclusions of law (*Petty v. Emery,* 88 N. Y. S. 823); that allegations that defendants have unlawfully combined and confederated together to accomplish an object by threats, intimidation and coercion, are conclusions of law only (*Boyer v. W. U. Tel. Co.,* 124 Fed. 246, 248—where the court observed, *inter alia,* that ''it is not illegal to threaten to do a lawful thing'', and that ''the law never presumes

wrong, or crime, or illegality; it presumes always in favor of right and legal action"); or that, for another example, an allegation that parties have wrongfully, fraudulently and unlawfully confederated, connived and colluded to injure plaintiff, is insufficient to lay a foundation for equity jurisdiction (*Nye v. Washburn,* 125 Fed. 817). Without pursuing this subject further, we feel justified in applying to this amended bill the same criticism which was applied to an attempt to translate into "oratorical endeavor" the procedure characteristic of this pleading:

> "But the court is admonished it must bear in mind that 'the term Rockefeller' is a synonym for 'secretiveness', 'successful manipulation', 'sly and subtle machinations', 'sphinx-like mystery', only known by results. However, that may be, however effective on the stump and curb, it is of no impressiveness in court. Herein the fraud charged must be proven and by legal evidence, and not merely alleged in pleadings and for proof resting upon argument and oratorical endeavor."
>
> *Wall v. Anaconda Copper Mg. Co.,* 216 Fed. 242, 246; affirmed, sub nomine *Wall v. Parrott Silver & Copper Co.,* 244 U. S. 407.

But even where this bill attempts to state facts, as distinguished from epithets, conclusions and denunciations, it is not conspicuous for clarity, but seems throughout to be infected with vague generality. Ignoring rhetorical fulminations and all formal allegations, and stripping the amended bill of its verbiage, one gathers that, during relevant times, the company was capitalized at 150,000 shares of the par value of $1 each, and so distributed that Overton had 11,353 shares, Martin 2500 shares, and the defendants 97,933½ shares,

of which 87,833½ shares "is a pool held for voting purposes and participated in and owned by L. Osborn, Wm. S. Noyes, B. S. Noyes and L. M. Doherty". For more than two years prior to the filing of the bill, the directorate consisted of Wm. S. Noyes, B. S. Noyes, L. Osborn, J. W. F. Peat and L. M. Doherty; B. S. Noyes was president, Wm. S. Noyes, vice president and general manager and L. Osborn, secretary and treasurer. During all relevant times, the company owned a certain mining property situate in Presidio County, Texas, designated as Survey No. 8, or Section 8, called the Presidio Mine, which, together with its improvements and appurtenances, was worth $50,000, and upwards. Since the middle of December, 1912, William S. Noyes was the owner of Section 5, a tract of land adjoining Section 8, and, since May 26, 1913, he has continuously been, and is now, the record owner of Section 5. On October 7, 1912, the directorate included Messrs. Fish, Peat, Gardiner, Herger and Osborn; Peat was president, Fish vice president, and Osborn, secretary and treasurer; and "Wm. S. Noyes was, on said date, appointed superintendent of said corporation". This last statement seems ambiguous—even lacking in frankness; and if upon reading it the inference should suggest itself that October 7, 1912, was the date of the commencement of Mr. Noyes' connection with the company we trust that it will not be regarded as indelicate if we hint that, to the knowledge of the Presidio Mining Company world, not excluding the donor of the Overton and Martin stock, Mr. Noyes had been superintendent of the corporation continuously ever since its organization in 1883.

During December, 1912, Mr. Noyes secured an option on all but four shares of the capital stock of the Silver Hill Mill & Mining Co., then the owner of Section 5. About December 12, 1912, Osborn was the largest individual stockholder of the Presidio Mining Company, and then transferred to Mr. Noyes 28,607 shares of his stock, and Mr. Noyes obtained it, pursuant to the alleged conspiracy to defraud the company about which so much is said in this pleading; but in this connection we digress to observe that no fact or facts constitutive of extortion of this stock from Osborn by Noyes, are anywhere stated or attempted to be stated. About January 9, 1913, Mr. Noyes "secured the control of the majority interest of the capital stock of said Presidio Mining Company"; and we are then told that after December 12, 1912, Mr. Noyes "conspired and negotiated" with the then owners of the majority control until he, personally, acquired domination. One does not readily grasp the meaning of all this, and it is quite impossible here to discriminate between acquisition of the majority of the shares, upon the one hand, and the favorable cleavage of sentiment within the company, upon the other. But, pursuant to the conspiracy charged, conceding however the publicity incidental to minutes, resolutions, documents and other records, complainants charge that the following things were done by these very unreserved "conspirators":

> "Voted on January 29th, 1913, to enter into a certain lease with the Silver Hill Mill & Mining Company, and authorized the making of a fifteen thousand ($15,000) dollar loan.
>
> "On January 31st, 1913, elected Wm. S. Noyes and L. M. Doherty directors of said Presidio Mining Company. On

February 15th, 1913, authorized by resolution the payment of forty-five thousand ($45,000) dollars to Wm. S. Noyes as a bonus for securing a lease to Section 5, and while Wm. S. Noyes was the owner of said section.

"Paid to Wm. S. Noyes, on said bonus aforesaid, $24,500 up to October 14th, 1913, and $2,003.60 on royalties under contract of lease dated January 25th, 1913, authorized January 29th, 1913.

"On October 6th, 1913, attempted at a stockholders' meeting to ratify all the acts and deeds of the directors of said corporation theretofore done and performed in 1913.

"On November 19th, 1913, cancelled contract of lease authorized January 29th, 1913, and ratified October 6th, 1913; and entered into a new agreement with Wm. S. Noyes relative to the operation of Section 5.

"Borrowed from January, 1913, and authorized indebtedness at various times during the year 1913 of the total sum aggregating approximately eighty-six thousand ($86,000) dollars.

"All of which acts, deeds and transactions are hereinafter more fully set forth." (47-8)

The remainder of this amended bill appears to be a repetitious amplification of various circumstances claimed to be connected with the foregoing items. Paragraph XIII deals with various company meetings; that of January 29, 1913, February 15, 1913, April 2, 1913, June 7, 1913, September 5, 1913, October 6, 1913, and November 19, 1913; but this paragraph discloses nothing that is not already recorded in the minutes, adduces no new fact or facts, and in no tangible way increases the sum of our corporate knowledge. Paragraph XIV is principally concerned with the views of the pleader concerning the acquisition of Section 5 by Mr. Noyes; its cost, its geographical situation, the then financial ability of the company to purchase the section, the prevention of the company by Mr. Noyes and the

other defendants from purchasing, Mr. Noyes' action as to the $45,000 resolution, his being "thoroughly familiar" with the "probable" location of ore deposits in Section 5, its necessity to the company, the knowledge of the directors that Mr. Noyes owned Section 5, and the payment of certain minor expenses in connection therewith—are touched upon; it is then asserted that the Silver Hill Company stockholders were induced to part with their stock on information from Mr. Noyes and his agents, and on their own understanding, that Section 5 was being acquired for the Presidio Mining Company, to be operated with that company's property, and that thereby the town of Shafter, where the principal Silver Hill Company stockholders had business interests, would be economically benefited; it is next alleged that, during 1913, Mr. Noyes received $24,500 under the resolution of February 15, 1913, and $2,003.60 as royalty under the lease of January 25, 1913, that the bonus was voted him, and payments made thereunder, to provide him with the funds necessary to acquire Section 5, and that the greater part of those funds were used by him in that purchase; after claiming Mr. Noyes to have been without means, this paragraph then declares, forgetful of paragraph VII, and of the facts exhibited in paragraph XII at page 46, that the bonus of February 15, 1913, was voted Mr. Noyes before he acquired the legal title to Section 5 and before he had fully paid for his option upon the Silver Hill Company stock—a statement which, if of the slightest real importance, is crassly inconsistent with the statement upon page 59,

> "That said directors knew said Wm. S. Noyes was the owner of Section 5, and that the said lease (dated Jan. 25, 1913) was made with him, although under the guise of having been made with the Silver Hill Mill & Mining Company";

reference is then made to the indebtedness of the company, the participation of Mr. Peat in the bonus of February 15, 1913, the valuelessness of the lease of January 25, 1913, the circumstances of its cancellation, the "exorbitant" salaries, the valuelessness of the second lease of November 19, 1913, the receipts of Mr. Noyes, the productivity of Sections 8 and 5, and the claim that Section 5 bears no part of certain expenses special to the company itself; and the paragraph closes with a denial of ratification by the minority stockholders, and with a further denial of laches—anticipatory denials big with significance.

Paragraph XV, after complaining that the salary of the mine superintendent was raised from time to time, and that none of the San Francisco officers, save Mr. Noyes, ever visited the mine or participated in its operation—though why they should, complainant fails to explain—then goes on to become hypothetically prophetic about possibilities; and paragraph XVI claims Section 5 for the company. Paragraph XVII deals with the activities of Overton, not Martin or any other stockholder, during 1915, and with the corporate books and records and reports; paragraph XVIII is a very vague, general and unspecific criticism of the administration because of its asserted failure to account, its chicanery and deceit, looting of the treasury, and plunging of the company into debt; paragraph XIX asserts

the necessity of a receivership; paragraph XX claims that the company was defrauded and pillaged out of Section 5 and $150,000; and paragraph XXI asserts in general terms the uselessness of any demand upon the majority interest to bring suit. Then follows the prayer.

From this hurried review of this amended bill, it is quite plain, we think, that the pleader still adheres to that theory of a resulting trust which permeated the original bill; no other view, is, we submit, compatible with the declarations of paragraph XIV which asserts that the bonus of February 15, 1913, was voted Mr. Noyes, and the payments were made thereunder, for the purpose of providing him with the funds necessary to acquire Section 5, and that the greater part of those funds were used by him in that purchase. And in addition to this, we find numerous statements made in this pleading which even the most infatuated fanatic could not, with any sanity, have believed, and which—we may for once anticipate—were quite unsupported by proof; such, for example, as the asserted financial ability to purchase Section 5, the prevention by Mr. Noyes of the company's purchase of that section, and the participation by Mr. Peat in the bonus voted on February 15, 1913; and as to such extravagant and reckless statements, it has been remarked that:

> "The complaint is replete with allegations of fraudulent acts so variant from what the evidence shows to be true, from what plaintiffs knew to be true, or could have so known, that it appears reckless and in part to the point of willful falsehood. To this another illustration is the allegation of conveyance of Parrott property in trust for

> the 'other persons'; no such property ever having existed. All this appearing, any suit is discredited."
>
> *Wall v. Anaconda Mg. Co.*, 216 Fed. 242, 245; affirmed, sub nomine, *Wall v. Parrott Copper Mg. Co.*, 244 U. S. 407.

The inefficiency of the statement that the bonus of February 15, 1913, was voted Mr. Noyes before he acquired the legal title to Section 5 and before he had fully paid for the Silver Hill Company stock, becomes clear when we recall that since the middle of December, 1912, Mr. Noyes "was the owner" of Section 5 (par. VII), "that during December, 1912, Wm. S. Noyes secured an option on all but four (4) shares of the capital stock of the Silver Hill Mill and Mining Company, the then owner of Section 5" (par. XII, p. 46), and that, as early as the lease of January 25, 1913, the "directors knew said Wm. S. Noyes was the owner of Section 5, and that the said lease was made with him, although under the guise of having been made with the Silver Hill Mill & Mining Company" (par. XIV, p. 59); and if by this inefficient statement it should be sought to be suggested that funds of the Presidio Mining Company were used by Mr. Noyes in the purchase of Section 5, we must record our unalterable resistance to that suggestion, and refer to the views hereinafter urged to vindicate our position. And why, indeed, should this pleader have been so solicitous as to attempt to forestall objections based upon ratification and laches? This procedure is not usual; it is, indeed, so unusual as to suggest that the pleader was conscious of and harassed by the very objections which he thus

sought awkwardly to elude; and one is reminded of the pithy but penetrating French proverb *"Qui s'excuse, s'accuse"*. Nor is there in this amended bill any reproduction of that commendation of conditions at the mine, which, in an unguarded moment, escaped into the original bill; this omission is, we think, to be attributed to that mental attitude wherein everything done by the present administration is wrong and nothing done by it is right; but we submit that such a policy as this is not calculated, in the minds of impartial men, to increase confidence in the equitable disposition of the author of the "control the management" letter. And in view of the broad demands made for a receivership and injunctions, particularly in the case of a going concern, it may be added that, beyond the bald conclusion (par. XVIII, p. 76), no adequate allegations of irreparable injury are made, nor is even an attenuated showing attempted of the insolvency of any of those sought to be charged by this bill—on the contrary, if we take the assertions of this pleading at their face value, Mr. Wm. S. Noyes, the paramount object of the benevolence of the farmer (608) who would "control the management" of a mine, must necessarily be a rich man and well able to respond to a decree.

Thereafter, answers were put in by the various defendants, and by Mr. Noyes. These pleadings were fully responsive to the complainants' bill; all charges of fraud, conspiracy, looting, pillaging, and the like, were fully denied; where a fact was correctly stated by complainants, it was plainly admitted; where explanations seemed appropriate they were given; and in para-

graph XXII of each answer an effort was made to set forth, in substance, a consecutive history of the varying fortunes of the Presidio Mining Company from the time of its incorporation in 1883 down to the instant litigation.

The cause came on regularly for trial on March 16, 1916, and at that time the complainants filed certain amendments to their amended bill, and also a supplemental bill. Beyond correcting mistakes, these amendments added nothing to what we already knew concerning complainant's attitude (239). The supplemental bill, in its paragraph II, states that *after Mr. Noyes secured his option on the Silver Hill Co. stock,* he visited Section 5, and "ascertained" that there were from ten to twenty thousand tons of ore there, worth over $100,000; that he then borrowed the money wherewith to purchase the Silver Hill Company stock, obtaining $10,000 from the Marfa National Bank and giving his Presidio Company stock as collateral, and $10,000 from Benton Bowers of Oregon, and giving his note for $5,000 to Harry Young; and that, on securing the Silver Hill Company stock, he made the fifty-cent lease of January 25, 1913. In paragraph III, it is asserted that Mr. Noyes, "during these negotiations, took advantage of the shortage of L. Osborn, the secretary of the company, in the sum of over $10,000", and "that he thereafter covered up and concealed the shortage", by taking $11,000 from the company treasury pursuant to the resolution of February 15, 1913. An attack is then made upon the correctness of the minutes of the meeting of January 29, 1913, in certain particulars disconnected

from the adoption of the fifty-cent lease, this being the solitary instance in which any attempt was made to impeach the minutes. The remainder of this paragraph is replete with assumptions, conclusions and general accusations, it being assumed, for example, that some undefined duty rested upon Mr. Noyes to tell Gardiner and Herger that he was "in practical effect the sole owner of Section 5" (229), and that he should have made a special trip from Texas to San Francisco to tell them so, disregarding his duties as to the cyanide plant; and it being concluded that Mr. Noyes "concealed" this information from Gardiner and Herger; and it being concluded that at the meeting of January 31, 1913, there were "only two lawful directors", and that the board thereafter was "an illegal board"; and the complainant's facility in accusation being further exhibited by the charge of "conspiracy" against Mrs. Willis also, "to conceal the Osborn peculations from the other stockholders". Paragraph V deals with the Osborn shortage; it asserts that no entry of the shortage was made in the company books; the charge of concealment is repeated; the dealings between Mr. Noyes and Osborn are told in complainant's quaint way; and complainant thinks that $450 per month for the mine superintendent, and $150 per month for a San Francisco bookkeeper and accountant, would be enough at present in the way of salaries. In paragraph VI, complaint is made of the failure to hold an annual meeting in February, 1916, and this although complainant is constrained to concede that in this matter defendants followed the advice of counsel, no claim

being made by complainant that counsel's advice was wrong; paragraph VII reiterates the complaint about the acquisition of Section 5, with which we are familiar; paragraph VIII deals with the method of signing annual reports to stockholders, complaining because they were not, since 1913, signed by the president, but were signed by the vice president and general manager, and thus complainants did not learn until March, 1915, that Mr. B. S. Noyes was the president; this paragraph refers, also to the absence of dividends since 1905, and to the three instruments under the authority of which money was paid to Wm. S. Noyes. Paragraph IX calls attention to conflicting figures in sundry government reports, but makes no claim that these various reports dealt with the same subject-matter, or covered the same period of time, or that the conflict is to be attributed to any improper motive whatever. Paragraph X is another attempt to escape the inevitable charge of laches, and will be fully analyzed in that portion of this brief which discusses the laches of complainants; and paragraph XI is a further example of reiteration which adds nothing new.

Like the other pleadings of complainants, this supplemental bill is quite pervious to analytical criticism, but we can do no more at this point than call attention to a single characteristic. It will be recalled that both the original and the amended bills proceeded upon the theory that a resulting trust arose in favor of the company as to Section 5; but when we examine this supplemental bill, we find the resulting trust theory abandoned, and the concession made that Mr. Noyes ob-

tained the money wherewith to purchase the Silver Hill Company stock by borrowing it from the Marfa National Bank and Mr. Benton Bowers, and by giving his note to Harry Young for $5000. This deliberate abandonment of the theory of a resulting trust is, we submit, an admission that the funds which purchased Section 5 were not originally, contemporaneously (*Olcott v. Bynum*, 84 U. S. (17 Wall.) 60; *1 Perry Trusts,* 6th Ed., Sec. 126, 133; *Roberts v. Ware,* 40 Cal. 634, 637; *Hunt v. Friedman,* 63 id. 510, 513), furnished by the company; and this view is, we think, fortified by the following declaration made on behalf of complainants:

> "Mr. Rose. Our claim is this, our whole contention is this: that Mr. Noyes borrowed the money and gave his personal notes, for instance, one for $10,000, another for $10,000 and another one for $5,000, and with that money he paid to the stockholders of the Silver Hill Mill and Mining Company the sum of $24,000, but that the notes themselves which he gave, from which these moneys were paid, were not paid until a year or year and a half thereafter that particular period, and the moneys were taken from the corporation." (694)

It cannot reasonably be pretended, nor would the pretense be seriously considered if made, that this change of front was the result of accident; because, when the original and amended bills were filed, complainants then knew, as well as they knew when the the supplemental bill was filed, all of the relevant facts; Overton, with his solicitor, Mr. Glidden (584 et seq.) had been making a "thorough investigation of the Presidio Mining Company's affairs"; and neither he nor his solictor could have been any more mistaken as to the original source from which Mr. Noyes ob-

tained the purchase price of Section 5, than as to the excellent condition of the mine and mill which, as the result of Overton's personal visit, was duly commended in the original bill—a commendation suppressed in the subsequent pleadings, in the interest, we suppose, of scrupulous fairness to these defendants. Having committed themselves, in two separate pleadings, to this theory of a resulting trust, and having brought these defendants into court to respond to that theory of the case, we do not believe that any additional presumption of equitable purpose is raised in favor of these complainants when we find them, upon the eve of the trial, shifting their ground and seeking to mend their hold by presenting the new claim that the moneys that purchased Section 5 did not originally come from the company at all, but were obtained upon the personal credit of Wm. S. Noyes, and that it was not until a year, or a year and a half, thereafter, that Mr. Noyes' notes were paid off, and paid off, so they assert, with money taken from the corporation.

> "It is essential to the formation of the issues, and to the intelligent and just trial of causes, that a complaint should proceed upon a distinct and definite theory"

Chicago, etc. Co. v. Bills, 3 N. E. (Ind.) 611;

> "It is an established rule of pleading that a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed or not succeed at all. A complaint cannot be made so elastic as to take form with the varying views of counsel"

Mescall v. Tully 91 Ind. 96;

and it is therefore not possible to put a case into condition for trial without having constructed a clear and

definite theory of the case—a theory which the pleadings must outline, the evidence sustain, and the law support. This theory must be embodied in the pleadings; and this principle is recognized in the elementary rules of practice, and notably so in the familiar rule of evidence that a party must recover *secundum allegata et probata,* and that the evidence must correspond with the allegations and be confined to the point in issue (*Aetna Powder Co. v. Hildebrand,* 37 N. E. (Ind.) 136; *Supervisors v. Decker,* 30 Wisc. 624; *Romeyn v. Sickles,* 15 N. E. (N. Y.) 698; *Markover v. Krauss,* 17 L. R. A. 806; *Ill. etc. Co. v Slatton,* 54 Ill. 133; *Mich. etc. Ry. v. McDonough,* 4 A. R. 466; *Hambrick v. Wilkins,* 7 A. S. R. 631; *Lake Shore etc. Co. v. Perkins,* 25 Mich. 329; *Rome Exch. Bk. v. Earnes,* 1 Keyes, N. Y. 588; *Lockwood v. Quackenbush,* 83 N. Y. 607; *Snow v. Ind. etc. Ry.* 9 N. E. (Ind.) 702; *Caton v. Caton,* L. R. 2 H. L. 127; *Stanton v. Baird Lumber Co.,* 32 So. (Ala.) 299; *Moss v. N. C. Ry.,* 29 S. E. (N. C.) 410, 411; *Wilson v. Chippewa etc. Co.,* 98 N. W. (Wisc.) 536; *Sager v. Blain,* 44 N. Y. 445; *Judy v. Gilbert,* 40 A. R. 289; *Moorman v. Wood,* 19 N. E. (Ind.) 739).

As suggested by the Court of Appeals in New York,

> "It is enough to say that a trial in a Court of Justice is meant to be a fair struggle after the truth, and not a rivalry of shrewdness, or a trap for the unwary"

Salisbury v. Howe, 87 N. Y. 128, 134;

and that the courts are opposed to shifting and fluctuating theories which take form with the varying views, or

the afterthoughts, of a party, may be illustrated by the underlying principle of the following authorities:

Buena Vista Co. v. Tuohy, 107 Cal. 243;
Perry v. Malarin, id. 363;
Rodgers v. Kimball, 121 id. 247;
Schirmer v. Drexler, 134 id. 134;
Nicholls v. Randall, 136 id. 426;
Kredo v. Phelps, 145 id. 526;
Ohio etc. Co. v. McCarthy, 96 U. S. 258, 268.

In the case last cited, the Supreme Court said:

> "Where a party gives a reason for his conduct and position touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

The supplemental bill was answered by defendants as fully and completely as the amended bill (262 et seq.).

It was upon these pleadings that the cause proceeded to a hearing. During the course of the hearing, the following occurred:

> "The COURT. I want to say to counsel at this time that I desire to designate a public accountant, Mr. Kink, to examine the books of this company. I want Mr. Klink to have furnished him access to the books of this company, and have him employed to expert them from 1907 to 1912, and down to the present time. I want him furnished with everything in the way of data that will enable him to determine how the computations, the method and system of computations under which payments have been made to William S. Noyes for ore from Section 5 are based upon proper principles and calculated to produce correct results.

"Mr. HARDING. The books were opened after the fire of 1906, and we request that he make the examination from that time down.

"The COURT. Very well, I would like to have that done.

"Mr. HARDING. I want to say that, that if after he finishes his examination, there should be any question in his mind as to the propriety of the accounts kept at Shafter, we will send him down there so that he may examine those books.

"The COURT. Counsel on both sides will be at liberty to suggest to the accountant any special subject matter that they wish him to embody in his report, but I want all data which will be involved in the inquiry as to the correctness of the method of determining the proper pro rata of each side, furnished to Mr. Klink. I am referring now to the proportion paid to the mining company and the proportion paid to Mr. Noyes, arrived at under the resolution regarding ores of Section 5 and how they are divided, for my own satisfaction.

"Mr. ROSE. We would be very glad to have the expert examine the books of the company in Texas as well. We would like to have a thorough examination made of the books.

"The COURT. I agree with the suggestion that Mr. Klink be permitted to go over the books at Texas regarding the tramway matter.

"Mr. HARDING. The books were opened here shortly after the fire in 1906.

"The COURT. But his examination need not be restricted to that period so far as the books kept at the mine are concerned.

"Mr. HARDING. No.

"The COURT. I wish his examination also to extend in a general way into the relations between the company and Gregg & Gleim, under the contract that has been put in evidence here, and the transactions had between the company and Gregg & Gleim in the building of this tramway. I want Mr. Klink notified that his employment is at the direction of the court and not either side." (919-921)

And thereafter, when the matter of the argument of the cause came before the court for consideration, the following occurred:

"Mr. HARDING. What are your Honor's wishes in regard to the future presentation of argument, by brief or orally?

"The COURT. When Mr. Klink renders his report I will want Mr. Klink to produce it here and have him explain his report fully, and what the conclusion is to be drawn from that. He is a very fair-minded man, and his results are always satisfactory to me, as far as my observation goes, and are very close and very correct. I would want it introduced here so that he could answer any question that might arise in my mind from an examination of his report; then the case will be ready for final submission. That time cannot be fixed now—the time for a definite hearing.

"Mr. HARDING. Your Honor yesterday made some suggestion that both sides might propound certain questions that they wanted the expert to answer.

"The COURT. Draw an order for the court to sign, and let that order be the result of counsel's mutual desire, as to what shall be the salient features to be disclosed in the examination by Mr. Klink.

"Mr. HARDING. We might prepare such an order in the course of the next day or so.

"Mr. ROSE. Yes.

"Mr. HARDING. And we will have that order embody the particular matters your Honor wants considered.

"The COURT. Let the order recite that the expert is appointed by the court, by consent of the parties, and in accordance with the eventual outcome of the case, the expense will be a subject-matter of costs, a proper subject-matter of costs.

"Mr. HARDING. For the time being, will your Honor continue the case?

"The COURT. The case will simply be continued for further hearing until that report comes in, then either side can bring it to the attention of the court and have it set down for hearing. I want everything that Mr. Klink

may call for produced him, without applying to the court. I want counsel to furnish him with the fullest data, that may be supplied from the records of the company, for the purpose of this investigation.

"Mr. HARDING. There is one other matter I should have mentioned. How far does your Honor want him to make an examination at Shafter? Down there, the books run from 1883.

"The COURT. Nothing has appeared in this case to indicate to my mind a necessity of going back at Shafter beyond the date his examination will cover in the San Francisco office. I think you suggested that you wanted it covered from 1907——

"Mr. HARDING. From 1906, or the time when the books were opened, after the fire.

"The COURT. Yes, you can very readily agree upon that in the order, so that the order will definitely inform Mr. Klink of the extent of his examination and what it is desired the report shall show. Unless, in the meantime, counsel shall reach an amicable adjustment of the case, in which event you may leave out Mr. Klink.

"The following is the order of said court, appointing Mr. Klink:

"[Title of Court and Cause.]

"ORDER APPOINTING ACCOUNTANT.

"Good cause appearing therefor, and by consent of the parties, it is hereby ordered:

"That the firm of Klink, Bean and Company, certified public accountants, of San Francisco, California, forthwith proceed to examine the books, records, files and vouchers of the Presidio Mining Company and make a general audit of the same commencing with April 18th, 1906, to date hereof, and report to this court the results of said examination.

"It is further ordered, that said accountants be furnished with all books, records, files or vouchers of said Presidio Mining Company, either in its office at San Francisco, or in its Shafter office, or in the hands of any of its officers, requested by them in the course of their examination, and that after completing such examination at San Francisco, that said accountants proceed to Shafter, Presidio County, Texas, and there make a like examination of the

books, records, files and vouchers kept by the corporation at its mine and mill from April 18, 1906.

"That such examination of said books and records be made as will enable such accountant to answer any questions that may be put to it by the court to lay before it any and all information it may desire as to the affairs and transactions of said Mining Company, covered by the period herebefore specified as disclosed by its books.

"It is further ordered that counsel for either of the respective parties to this suit may direct the attention of said accountant to any special matters for examination they may desire.

"Dated this 8th day of April, A. D. 1916.

WM. C. VAN FLEET, Judge."

(963-967)

And this order was accompanied by the stipulation set forth in the record, making suggestions relative to particular matters pertaining to the company affairs. Pursuant to these proceedings, the accountants made and filed their report; in making their investigations, they had the assistance of Mr. Cox, an experienced mining engineer (1042); and this report, which was a most elaborate review of the company and its affairs, was called to the attention of the learned judge below, on August 25, 1916, and was regarded by the learned judge as evidence in the case (1036). We respectfully invite the most careful scrutiny of this report, not only because of the spontaneity of the original judicial suggestion of the appointment of the expert, not only because of the high judicial commendation of the ability and quality of work of that expert, and not only because of the elaborate character of the report presented, but also because of the numerous instances in which that report corroborates and supports the

views advanced by the defendants upon the hearing below.

Thereafter, on August 29, 1916, the cause was ordered submitted; and over a year later, on December 3, 1917, the learned judge below announced his interlocutory decision in favor of complainants, from which decision the inference does not seem unreasonable that the two principal points in the mind of the learned judge were the transfer of the Osborn stock, and the acquisition of Section 5 by Mr. Noyes,—the learned judge did not, indeed, hesitate to refer to the acquisition by Mr. Noyes of Section 5 as "the main matter for consideration in the case" (419). Thereafter, on December 28, 1917, defendants moved the court to reopen the case, their motion being supported by affidavits; one of these affidavits was made by Osborn, and related the circumstances connected with the transfer of his stock and the discovery of his shortage; and there were corroborating affidavits. The complainants replied to this showing; and on January 28, 1918, defendants' motion to re-open the cause was denied, defendants excepting (360). Thereupon defendants made and filed their objections to the appointment of a receiver; complainants made their answer; and defendants filed their reply on February 11, 1918 (417). The result will be found in the interlocutory decree of February 20, 1918, a decree which is very lengthy, very broad and sweeping in favor of complainants, which continues the injunctions already in force and provides for a receivership. On the same day, the receiver was appointed. No special showing was made; it was not, for example, shown that the

Presidio Mining Company was not a going concern, or that any irreparable injury was imminent, or that the injunctions in force were inadequate protection, or that any of the defendants were insolvent, or unable to respond to a money decree; and the evident reliance of complainants and the learned judge below rested upon what were conceived to have been the disclosures of the main case. And it may be added that the order appointing this receiver is conspicuous for its universality; it invests the receiver with the most complete and plenary powers; and it removes the entire possession, management, control and disposition of the company and its affairs quite out of the hands of its board of directors.

This interlocutory decree continues in force the injunctions which had been issued during the course of the hearing, by the learned judge of the court below; and by these injunctions, moneys, land and shares of the capital stock, were, so to speak, impounded. The second of the injunctions continued in force not only required William S. Noyes, B. S. Noyes and L. Osborn to deposit 59544 5/6 shares of the capital stock with the clerk of the court and forbade them from transferring those shares, or any part of them, but also it affected to deal with the stock of Frank M. Parcells, a stranger to the litigation (299). With special reference to Mr. Parcells, although Mr. Parcells was not a party to the suit, never had a day in court upon any question therein which affected him or his property, and never had any opportunity to defend himself or his property,

yet the interlocutory decree appealed from undertakes to adjudge that the transfer of stock to him was

> "part of a fraudulent and collusive plan to illegally manipulate and control the affairs of the Presidio Mining Company by William S. Noyes, through his biddable board of directors, participated in by the defendants other than the Presidio Mining Company" and "a fraud on said last named corporation and its minority stockholders."

Needless to say, Mr. Parcells was never a member of the board of directors of this company; he was in no way connected with that board or any of its activities; and, so far as our examination of the record in this cause will permit us to make the statement, from the beginning to the end, save and except in this injunction and decree, Mr. Parcells' name is nowhere mentioned.

The same criticism of this decree is, in the main, true of Mr. J. D. Ralph; the transfer of stock to him is likewise adjudged to be tainted with fraud; but Mr. Ralph never was a member of the board of directors; there is no testimony whatever connecting him with that body; from the beginning to the end of the case, save and except in the very decree itself appealed from, his name has never been mentioned; he was not a party to the suit; and he never had his day in court, or any opportunity to defend, upon any question in the cause which concerned him or his property—like Mr. Parcells, Mr. Ralph was convicted behind his back, so to speak. And while upon this aspect of the decree, it may further be added that neither Mrs. Willis nor her estate was a party to this suit. It appeared during the hearing that she was dead, and that her stock was inven-

toried in her estate, and that Miss Doherty was appointed her executrix (536; 690-1); but, in the suit at bar, neither Mrs. Willis nor her estate was "represented by defendant L. M. Doherty", as the decree asserts (427); nor was her estate represented in any manner by any person. Although Miss Doherty individually, but not as executrix of the estate of India Scott Willis, deceased, was a party to the suit, yet this decree adjudges transfers of stock of this dead woman, neither whose estate nor whose executrix ever had any day in court, or opportunity to defend, to have been part of a plot to defraud. Upon what authority or showing this decree undertook to deal with the rights or the property of Mr. Parcells, or Mr. Ralph, or Mrs. Willis, or her estate, we are unable to understand; we do not believe that any issue as to their rights or property, in respect of this stock, could properly be litigated among strangers, so as to bind any of them.

Hobbs Mfg. Co. v. Gooding, 176 Fed. 259.

ASSIGNMENT OF ERRORS ON APPEAL FROM INTERLOCUTORY DECREE.

[Title of Court and Cause.]

Now, on this 15th day of March, 1918, come the defendants Wm. S. Noyes, B. S. Noyes, L. Osborn, John W. F. Peat and L. M. Doherty, by their solicitors, R. T. Harding and Henry E Monroe, and say that there is manifest error on the face of the record in the above-entitled suit, and that the memorandum opinion filed herein on the 12th day of February, 1918, is

erroneous, and that the interlocutory decree made and entered in said suit on the 16th day of February, 1918, is erroneous and unjust to these defendants, and defendants hereby assign the same as error herein, for the following reasons:

Exception I.

That the court erred in refusing to dismiss said bill of complaint against said William S. Noyes in so far as the same seeks to charge him as a trustee of Section 5 for the use and benefit of the Presidio Mining Company, because the bill of complaint herein does not state a cause of action against the defendant William S. Noyes in so far as it seeks to charge him as a trustee of Section 5 for the use and benefit of the Presidio Mining Company:

(First) Because it is not averred therein that at the time of the purchase of said Section 5 by William S. Noyes the Presidio Mining Company had any right, title, or interest in or to Section 5, either vested or in expectancy; and

(Second) Because it is not averred in said bill of complaint that the said William S. Noyes was, at the time of the purchase of said Section 5, clothed with any fiduciary relation in regard thereto;

(Third) Nor does it appear by said bill of complaint that the said William S. Noyes was under any duty to purchase said Section 5 for the Presidio Mining Company; and

(Fourth) Because it appears in said bill of complaint that the said William S. Noyes purchased said

Section 5 with moneys borrowed on his own credit and responsibility, and not on the credit or responsibility of the Presidio Mining Company, and that the language of said bill of complaint in this behalf is as follows, to wit:

> "Said Wm. S. Noyes borrowed the money to pay for the stock of the Silver Hill Mill and Mining Company (the owner of Section 5), then held by him under option. That the borrowed $10,000 from the Marfa National Bank and gave as collateral security his stock in the Presidio Mining Company. That he borrowed $10,000 from one Benton Bowers, residing in Oregon, and gave his promissory note for $5,000 to Harry B. Young, in the premises" (page 2, supplemental bill).

(Assignments of Errors numbered 2 to 28, both inclusive, were withdrawn by stipulation dated November 14, 1918.)

Exception XXIX.

Benton Bowers, witness called by defendants, testified to the fact that in the latter part of 1912, he entered into a transaction with William S. Noyes; that the latter had made an arrangement for borrowing $10,000 if he should need some money; that he afterwards borrowed $10,000 and gave two notes for the same.

Mr. HARDING. Q. At the time when Mr. Noyes borrowed this money, did he tell you what he wanted to borrow the money for?

Mr. ROSE. I object to that.

The COURT. Objection sustained.

Mr. Harding. Exception for defendants.

And said defendants now assign said ruling as error under this their Exception No. XXIX.

If allowed to answer, the witness would have testified that Section 5, which was then under option to some New York people might be on the market, and that he (Noyes) wanted to be in a position to purchase Section 5 individually in the event that the Presidio Mining Company should not be in a position financially to purchase Section 5.

Exception XXX.

That the court erred in finding and decreeing that the defendants other than the Presidio Mining Company, as its majority directors and officers since December, 1912, in conducting its affairs, have been and now are guilty of fraud upon the Presidio Mining Company and its minority stockholders.

Exception XXXI.

That the court erred in finding and decreeing that prior to December, 1912, the defendant William S. Noyes illegally obtained benefits for himself while in a fiduciary relation, as the confidential employee and agent of the Presidio Mining Company, from business dealings had between said corporation and third persons.

Exception XXXII.

That the court erred in finding and decreeing that the defendant L. Osborn, during the period prior to December, 1912, illegally obtained and misappropriated

benefits and moneys from the Presidio Mining Company's treasury.

Exception XXXIII.

That the court erred in finding and decreeing that said defendants, as majority stockholders, directors and officers of said Presidio Mining Company, since December, 1912, participated in a conspiracy and collusion with William S. Noyes, to, and did, control and defraud said corporation.

Exception XXXIV.

That the court erred in finding and decreeing that the proceedings had and entered into by said defendants as directors and officers of said Presidio Mining Company since December, 1912, relative to leases, bonuses and contracts pertaining to Section 5, including payments made pursuant to said leases, bonuses and contracts, are fraudulent, illegal and void.

Exception XXXV.

That the court erred in finding and decreeing that the lease of January 25, 1913, entered into between Silver Hill Mill and Mining Company and Presidio Mining Company was fraudulent, illegal and void.

Exception XXXVI.

That the court erred in finding and decreeing that the bonus resolution adopted February 15, 1913, by some of the defendants as directors of the Presidio Mining Company was fraudulent, illegal and void.

Exception XXXVII.

That the court erred in finding and decreeing that the contract dated November 19, 1913, between William S. Noyes and the Presidio Mining Company was fraudulent, illegal and void.

Exception XXXVIII.

That the court erred in finding and decreeing that the resolution of the board of directors of the Presidio Mining Company, relative to giving William S. Noyes control over the operations of said corporation, are fraudulent, illegal and void.

Exception XXXIX.

That the court erred in finding and decreeing that the resolutions of the board of directors of the Presidio Mining Company relative to salaries and increases thereof, and payments made thereunder to said defendants as directors and officers of said corporation, are fraudulent, illegal and void.

Exception XL.

That the court erred in finding and decreeing that the resolutions of the board of directors of the Presidio Mining Company pertaining to the tramway construction and the tramway contracts entered into between Messrs. Gregg & Gleim and said corporation, and all acts, resolutions and proceedings relative thereto, are illegal and fraudulent.

Exception XLI.

That the court erred in finding and decreeing that the acquisition of Section 5 by defendant William S. Noyes was and is fraudulent.

Exception XLII.

That the court erred in finding and decreeing that Section 5 was acquired by the defendant William S. Noyes while in a fiduciary capacity and as the confidential agent, employee, manager and vice-president of said Presidio Mining Company.

Exception XLIII.

That the court erred in finding and decreeing that the legal title to Section 5 was illegally vested in William S. Noyes.

Exception XLIV.

That the court erred in finding and decreeing that Section 5 and the title thereto should have vested in, and now belongs to said Presidio Mining Company.

Exception XLV.

That the court erred in finding and decreeing that at all the times since the acquisition of Section 5, and recordation in William S. Noyes of the title thereto, said Presidio Mining Company at all the times has been and now is the lawful and equitable owner thereof, and that said William S. Noyes is a trustee of said Section 5 for, and now holds said title for the benefit of Presidio Mining Company.

Exception XLVI.

That the court erred in finding and decreeing that any and all benefits and moneys derived since December 1, 1912, directly or indirectly, by William S. Noyes, growing out of any leases, contracts, resolutions or proceedings had by and between Presidio Mining Company and Silver Hill Mill and Mining Company, or between the Presidio Mining Company and the defendant William S. Noyes, were and are illegally and fraudulently obtained.

Exception XLVII.

That the court erred in finding and decreeing that any and all claims heretofore or now held by William S. Noyes against Presidio Mining Company on account of any dealings between the Presidio Mining Company and the Silver Hill Mill and Mining Company or himself, relative to Section 5, together with any claims held by, through or under William S. Noyes or any other person, growing out of transactions relative to said property, are fraudulent, and illegal, and that said court erred in declaring the same canceled.

Exception XLVIII.

That the court erred in finding and decreeing that all stock transactions appertaining to and including transferring of the capital stock of the Presidio Mining Company by the defendant L. Osborn to defendants William S. Noyes and B. S. Noyes; and by India Scott Willis to B. S. Noyes; the so-called voting trust and its dissolution; the execution and delivery by L. Osborn to William S. Noyes of that certain collateral note dated Feb-

ruary 21, 1913, for $10,689.75; and the $45,000 bonus resolution adopted February 15, 1913, were and are parts of a fraudulent and collusive plan to illegally manipulate and control the affairs of the Presidio Mining Company by William S. Noyes, participated in by all defendants other than the Presidio Mining Company, and that said transactions were and are a fraud on said last named corporation and its minority stockholders.

Exception XLIX.

That the court erred in finding and decreeing that increases in salaries of defendants as directors or officers of the Presidio Mining Company, including the increases in salary of E. M. Gleim, since December, 1912, are illegal and fraudulent, together with all acts, proceedings or authorizations relative thereto, shown by the records of the Presidio Mining Company as having been adopted by said defendant directors and officers.

Exception L.

That the court erred in adjudging and decreeing that the injunction theretofore issued out of said court on the 30th day of December, 1915, commanding and restraining the defendant William S. Noyes, his agents, servants, employees, representatives or attorneys, and all persons acting in aid of them or either or any of them, from drawing or paying to themselves any further sum or sums of money from the Presidio Mining Company on account of ore taken or extracted from said Section 5, and that said company be restrained from paying any moneys to said William S. Noyes, or anyone in

his behalf, on account of said Section 5, either directly or indirectly, or on account of any ores theretofore or thereafter produced therefrom, and further restraining said William S. Noyes from transferring said Section 5, or any interest therein, pending the determination of this suit, or from in any manner clouding the title thereto, be kept in full force and effect, until the coming in of the Master's report, and until the entering of the final decree herein; and that in and by said final decree the said William S. Noyes shall be ordered and directed within thirty (30) days from the date thereof to transfer said Section 5 to the Presidio Mining Company by proper deed, free and clear of all liens and encumbrances, and that the court erred in further ordering that the aforesaid injunction or restraining order shall be kept in full force and effect until said conveyance from said William S. Noyes to the Presidio Mining Company shall have been made, delivered and recorded in the proper office in the county of Presidio, State of Texas, so as to fully vest, as aforesaid, the title to said Section 5 in said Presidio Mining Company.

Exception LI.

That the said court erred in finding and decreeing that at the time of the making, delivery and recording of a conveyance from the said William S. Noyes to the Presidio Mining Company, the said William S. Noyes, for himself and any other person claiming by, through or under him, shall deliver a full and complete discharge of any and all claims against said Presidio Mining Company heretofore or now held against said

corporation, by, for or on account of any lease, resolution, contract, act or proceeding relative to said Section 5, or in any manner appertaining thereto.

Exception LII.

That the court erred in finding and decreeing that the defendant L. Osborn report and account for all salaries received by him since January 1, 1913, from the Presidio Mining Company, or any of its officers on behalf of said corporation.

Exception LIII.

That the court erred in finding and decreeing that the defendants William S. Noyes, B. S. Noyes, J. W. F. Peat and L. M. Doherty report all salaries received by them each respectively, from the Presidio Mining Company since January 1, 1913; and that said defendants be required to present evidence before the Master, if any they have, to show that said salaries or increases thereof were and are reasonable and fair.

Exception LIV.

That said court erred in finding and decreeing that the Master appointed in and by said interlocutory decree also take and report like evidence in regard to the salary of E. M. Gleim, and any increases thereof.

Exception LV.

That the court erred in finding and decreeing that the collateral promissory note dated February 21, 1913, executed and delivered by defendant L. Osborn to Will-

iam S. Noyes in the sum of $10,689.75, is illegal and fraudulent, and in ordering said note to be delivered to the clerk of said court, subject to its further order.

Exception LVI.

That the court erred in finding and decreeing that the delivery of twenty-five thousand (25,000) shares of the capital stock of Presidio Mining Company, originally standing in the name of L. Osborn, and given to William S. Noyes as collateral to secure the payment of the promissory note mentioned in assignment of errors No. —— is declared likewise illegal and fraudulent.

Exception LVII.

That the court erred in continuing in force in and by said interlocutory decree the injunction theretofore issued out of said court in this suit, dated December 12, 1916, requiring the defendants William S. Noyes, B. S. Noyes and L. Osborn, and their representatives, to deposit 59,544 5/6 shares of the capital stock of the Presidio Mining Company with the clerk of said court, and forbidding said parties from transferring all or any portion of said shares of stock.

Exception LVIII.

That said court erred in adjudging and decreeing that said William S. Noyes account for all sums of money found by the Master as received by said William S. Noyes on account of said Section 5, together with interest thereon at the rate of seven (7) per cent per annum from dates of receipt of the several amounts

so received by him from the Presidio Mining Company, in addition to his salary since January 1, 1913.

Exception LIX.

That the said court erred in ordering and decreeing that said William S. Noyes further account for all sums of money received by him prior to January 1, 1913, other than salary, while in the employ of the Presidio Mining Company, and during the period while complainants were stockholders of said corporation, to wit, since on or about September 14, 1908.

Exception LX.

That said court erred in making and entering said interlocutory decree, or in decreeing in favor of the complainants and against these defendants.

Exception LXI.

That said court erred in not making and entering a decree herein in favor of the defendants and against said complainants for defendant's costs in this suit.

Exception LXII.

That the court erred in finding that the assets and properties of the defendant, Presidio Mining Company, have been dissipated by these defendants.

Wherefore, the defendants pray that said decree be reversed and the said District Court be directed to dismiss the amended complaint herein on file, and for

such other and further relief as may seem meet and equitable.

R. T. Harding and
Henry E. Monroe,
Solicitors for Said Defendant.

J. J. Dunne,
Of Counsel.

(Endorsed): Filed Mar. 16, 1918,
W. B. Maling, Clerk,
By J. A. Schaertzer,
Deputy Clerk.

ASSIGNMENT OF ERRORS ON APPEAL FROM ORDER APPOINTING RECEIVER.

[Title of Court and Cause.]

Now, on this 19th day of March, 1918, come said defendants, by their solicitors, and say that there is manifest error in the record in the above-entitled suit, and that the interlocutory order and decree of said court heretofore on the 20th day of February, 1918, given, made and entered in said action wherein and whereby Walter B. Maling, Esq., was appointed receiver in the above-entitled action of the properties in said interlocutory order and decree mentioned and with the powers and authorities therein stated, which said interlocutory order and decree is part of the judgment-roll herein, and is hereby expressly referred to for greater certainty herein, is erroneous and unjust to said defendants, and said defendants hereby assign the making, giving and entering of said interlocutory order and

decree appointing a receiver herein as error, for the following reasons:

Exception I.

That the court erred in refusing to dismiss said bill of complaint against said William S. Noyes in so far as the same seeks to charge him as a trustee of Section 5 for the use and benefit of the Presidio Mining Company, because the bill of complaint herein does not state a cause of action against the defendant William S. Noyes in so far as it seeks to charge him as a trustee of Section 5 for the use and benefit of the Presidio Mining Company:

(First) Because it is not averred therein that at the time of the purchase of said Section 5 by William S. Noyes the Presidio Mining Company had any right, title, or interest in or to Section 5, either vested or in expectancy; and

(Second) Because it is not averred in said bill of complaint that the said William S. Noyes was, at the time of the purchase of said Section 5, clothed with any fiduciary relation in regard thereto;

(Third) Nor does it appear by said bill of complaint that the said William S. Noyes was under any duty to purchase said Section 5 for the Presidio Mining Company; and

(Fourth) Because it appears in said bill of complaint that the said William S. Noyes purchased said Section 5 with moneys borrowed on his own credit and responsibility, and not on the credit or responsibility of the Presidio Mining Company, and that the language

of said bill of complaint in this behalf is as follows, to wit:

> "Said Wm. S. Noyes borrowed the money to pay for the stock of the Silver Hill Mill and Mining Company (the owner of Section 5), then held by him under option. That he borrowed $10,000 from the Marfa National Bank and gave as collateral security his stock in the Presidio Mining Company. That he borrowed $10,000 from one Benton Bowers, residing in Oregon, and gave his promissory note for $5,000 to Harry B. Young in the premises" (page 2, supplemental bill).

(Assignments of Errors numbered 2 to 28, both inclusive, were withdrawn by stipulation dated November 14, 1918.)

Exception XXIX.

That the court erred in finding and decreeing that the defendants other than the Presidio Mining Company, as its majority directors and officers since December, 1912, in conducting its affiairs, have been and now are guilty of fraud upon the Presidio Mining Company and its minority stockholders.

Exception XXX.

That the court erred in finding and decreeing that prior to December, 1912, the defendant William S. Noyes illegally obtained benefits for himself while in a fiduciary relation, as the confidential employee and agent of the Presidio Mining Company, from business dealings had between said corporation and third persons.

Exception XXXI.

That the court erred in finding and decreeing that the defendant L. Osborn, during the period prior to December, 1912, illegally obtained and misappropriated benefits and moneys from the Presidio Mining Company's treasury.

Exception XXXII.

That the court erred in finding and decreeing that said defendants, as majority stockholders, directors and officers of said Presidio Mining Company, since December, 1912, participated in a conspiracy and collusion with William S. Noyes to, and did, control and defraud said corporation.

Exception XXXIII.

That the court erred in finding and decreeing that the proceedings had and entered into by said defendants as directors and officers of said Presidio Mining Company since December, 1912, relative to leases, bonuses and contracts pertaining to Section 5, including payments made pursuant to said leases, bonuses and contracts, are fraudulent, illegal and void.

Exception XXXIV.

That the court erred in finding and decreeing that the lease of January 25, 1913, entered into between Silver Hill Mill and Mining Company and Presidio Mining Company was fraudulent, illegal and void.

Exception XXXV.

That the court erred in finding and decreeing that the bonus resolution adopted February 15, 1913, by

some of the defendants as directors of the Presidio Mining Company was fraudulent, illegal and void.

Exception XXXVI.

That the court erred in finding and decreeing that the contract dated November 19, 1913, between William S. Noyes and the Presidio Mining Company was fraudulent, illegal and void.

Exception XXXVII.

That the court erred in finding and decreeing that the resolution of the board of directors of the Presidio Mining Company, relative to giving William S. Noyes control over the operations of said corporation, are fraudulent, illegal and void.

Exception XXXVIII.

That the court erred in finding and decreeing that the resolutions of the board of directors of the Presidio Mining Company relative to salaries and increases thereof, and payments made thereunder to said defendants as directors and officers of said corporation are fraudulent, illegal and void.

Exception XXXIX.

That the court erred in finding and decreeing that the resolutions of the board of directors of the Presidio Mining Company pertaining to the tramway construction and the tramway contracts entered into between Messrs. Gregg & Gleim and said corporation, and all acts, resolutions and proceedings relative thereto, are illegal and fraudulent.

Exception XL.

That the court erred in finding and decreeing that the acquisition of Section 5 by defendant William S. Noyes was and is fraudulent.

Exception XLI.

That the court erred in finding and decreeing that Section 5 was acquired by the defendant William S. Noyes while in a fiduciary capacity and as the confidential agent, employee, manager and vice-president of said Presidio Mining Company.

Exception XLII.

That the court erred in finding and decreeing that the legal title to Section 5 was illegally vested in William S. Noyes.

Exception XLIII.

That the court erred in finding and decreeing that Section 5 and the title thereto should have vested in and now belongs to said Presidio Mining Company.

Exception XLIV.

That the court erred in finding and decreeing that at all the times since the acquisition of Section 5, and recordation in William S. Noyes of the title thereto, said Presidio Mining Company at all the times has been and now is the lawful and equitable owner thereof, and that said William S. Noyes is a trustee of said Section 5 for, and now holds said title for the benefit of Presidio Mining Company.

Exception XLV.

That the court erred in finding and decreeing that any and all benefits and moneys derived since December 1, 1912, directly or indirectly, by William S. Noyes, growing out of any leases, contracts, resolutions or proceedings had by and between Presidio Mining Compnay and Silver Hill Mill and Mining Company, or between the Presidio Mining Company and the defendant William S. Noyes, were and are illegally and fraudulently obtained.

Exception XLVI.

That the court erred in finding and decreeing that any and all claims heretofore or now held by William S. Noyes against Presidio Mining Company on account of any dealings between the Presidio Mining Company and the Silver Hill Mill and Mining Company or himself, relative to Section 5, together with any claims held by, through or under William S. Noyes or any other person, growing out of transactions relative to said property, are fraudulent, and illegal, and that said court erred in declaring the same canceled.

Exception XLVII.

That the court erred in finding and decreeing that all stock transactions appertaining to and including transferring of the capital stock of the Presidio Mining Company by the defendant L. Osborn to defendants William S. Noyes and B. S. Noyes; and by India Scott Willis to B. S. Noyes; the so-called voting trust and its dissolution; the execution and delivery by L. Osborn to William S. Noyes of that certain collateral note

dated February 21, 1913, for $10,689.75 and the $45,000 bonus resolution adopted February 15, 1913, were and are parts of a fraudulent and collusive plan to illegally manipulate and control the affairs of the Presidio Mining Company by William S. Noyes, participated in by all defendants other than the Presidio Mining Company, and that said transactions were and are a fraud on said last named corporation and its minority stockholders.

Exception XLVIII.

That the court erred in finding and decreeing that increases in salaries of defendants as directors or officers of the Presidio Mining Company, including the increases in salary of E. M. Gleim, since December, 1912, are illegal and fraudulent, together with all acts, proceedings or authorizations relative thereto, shown by the records of the Presidio Mining Company as having been adopted by said defendant directors and officers.

Exception XLIX.

That the court erred in adjudging and decreeing that the injunction theretofore issued out of said court on the 30th day of December, 1915, commanding and restraining the defendant William S. Noyes, his agents, servants, employees, representatives or attorneys, and all persons acting in aid of them or either or any of them, from drawing or paying to themselves any further sum or sums of money from the Presidio Mining Company on account of ore taken or extracted from said Section 5, and that said company be restrained from paying any moneys to said William S. Noyes, or

anyone in his behalf, on account of said Section 5, either directly or indirectly, or on account of any ores theretofore or thereafter produced therefrom, and further restraining said William S. Noyes from transferring said Section 5, or any interest therein, pending the determination of this suit, or from in any manner clouding the title thereto, be kept in full force and effect, until the coming in of the Master's report, and until the entering of the final decree herein; and that in and by said final decree the said William S. Noyes shall be ordered and directed within thirty (30) days from the date thereof to transfer said Section 5 to the Presidio Mining Company by proper deed, free and clear of all liens and encumbrances, and that the court erred in further ordering that the aforesaid injunction or restraining order shall be kept in full force and effect until said conveyance from said William S. Noyes to the Presidio Mining Company shall have been made, delivered and recorded in the proper office in the County of Presidio, State of Texas, so as to fully vest, as aforesaid, the title to said Section 5 in said Presidio Mining Company.

Exception L.

That the said court erred in finding and decreeing that at the time of the making, delivery and recording of a conveyance from the said William S. Noyes to the Presidio Mining Company the said William S. Noyes, for himself and any other person claiming by, through or under him, shall deliver a full and complete discharge of any and all claims against said Presidio Mining Company heretofore or now held against said

corporation, by, for or on account of any lease, resolution, contract, act or proceeding relative to said Section 5, or in any manner appertaining thereto.

Exception LI.

That the court erred in finding and decreeing that the defendant L. Osborn report and account for all salaries received by him since January 1, 1913, from the Presidio Mining Company, or any of its officers on behalf of said corporation.

Exception LII.

That the court erred in finding and decreeing that the defendants William S. Noyes, B. S. Noyes, J. W. F. Peat and L. M. Doherty report all salaries received by them each respectively, from the Presidio Mining Company since January 1, 1913; and that said defendants be required to present evidence before the Master, if any they have, to show that said salaries or increases thereof, were and are reasonable and fair.

Exception LIII.

That the court erred in finding and decreeing that the Master appointed in and by said interlocutory decree also take and report like evidence in regard to the salary of E. M. Gleim, and any increase thereof.

Exception LIV.

That the court erred in finding and decreeing that the collateral promissory note dated February 21, 1913, executed and delivered by defendant L. Osborn to William S. Noyes in the sum of $10,689.75, is illegal and fraudu-

lent, and in ordering said note to be delivered to the clerk of said court, subject to its further order.

Exception LV.

That the court erred in finding and decreeing that the delivery of twenty-five thousand (25,000) shares of the capital stock of Presidio Mining Company, originally standing in the name of L. Osborn, and given to William S. Noyes as collateral to secure the payment of the promissory note hereinabove mentioned is declared likewise illegal and fraudulent.

Exception LVI.

That the court erred in continuing in force in and by said interlocutory decree, the injunction theretofore issued out of said court in this suit, dated December 12, 1916, requiring the defendants William S. Noyes, B. S. Noyes and L. Osborn and their representatives, to deposit 59,544 5/6 shares of the capital stock of the Presidio Mining Company with the clerk of said court, and forbidding said parties from transferring all or any portion of said shares of stock.

Exception LVII.

That said court erred in adjudging and decreeing that said William S. Noyes account for all sums of money found by the Master as received by said William S. Noyes on account of said Section 5, together with interest thereon at the rate of seven (7) per cent per annum from dates of receipt of the several amounts so

received by him from the Presidio Mining Company, in addition to his salary since January 1, 1913.

Exception LVIII.

That the said court erred in ordering and decreeing that said William S. Noyes further account for all sums of money received by him prior to January 1, 1913, other than salary, while in the employ of the Presidio Mining Company, and during the period while complainants were stockholders of said corporation, to wit, since on or about September 14, 1908.

Exception LIX.

That said court erred in making and entering said interlocutory decree, or in decreeing in favor of the complainants and against these defendants.

Exception LX.

That said court erred in not making and entering a decree herein in favor of the defendants and against said complainants for defendants' costs in this suit.

Exception LXI.

That the court erred in finding that the assets and properties of the defendants, Presidio Mining Company have been dissipated by these defendants.

Exception LXII.

Said court erred in ordering and decreeing the appointment of a receiver in the above-entitled cause.

Exception LXIII.

Said court erred in appointing a receiver of Presidio Mining Company, including the Presidio Mine known as Section 8, Presidio County, State of Texas, and Section 5 adjoining said Section 8, together with the Presidio mill, and all improvements, appurtenances and equipment connected with said Sections 8 and 5, and all the real and personal property of said corporation of every kind and nature wherever situated, with full power to act in all particulars in the place and stead of the directors and officers of said corporation, pursuant to law in such cases made and provided, and after proper ancillary proceedings have been had where and when the same shall be required.

Exception LXIV.

Said court erred in appointing a receiver herein and in authorizing and/or directing said receiver to take immediate and exclusive possession of said Presidio Mining Company, its office, room 209, 255 California Street, San Francisco, California, its assets, books, records and papers, to continue, control, carry on and conduct its business in all its ramifications, including the mining, milling, handling its ores, selling its bullion, and to discharge the duties obligatory on said corporation.

Exception LXV.

Said court erred in appointing a receiver herein and in authorizing and/or directing said receiver to operate said Presidio Mine in and on Section 8, and Section 5, the milling and reduction plant of said corporation, and

manage said properties in such a manner as will in his judgment produce the most satisfactory results consistent with the discharge of the duties imposed thereon; to collect and receive all the income therefrom, and for such purpose is hereby invested with full power in his discretion to employ, discharge, fix compensation of any and all agents, attorneys, managers, superintendents and employees as may be necessary to aid in the discharge of his duties.

Exception LXVI.

Said court erred in appointing a receiver herein and in authorizing and/or empowering such receiver to make such investigations, institute and prosecute such suits, as may be necessary in his judgment for the recovery of moneys or other assets belonging to said corporation, or for the proper protection of the said properties and trusts hereby vested in him, and to likewise defend all such actions instituted against him as such receiver, the prosecution or defense of which in his judgment will be necessary for the proper protection of the said property placed in his charge or benefit, or increase the assets of said corporation; and in further empowering said receiver to take any and all steps by ancillary or other legal proceedings required by law in the proper courts and jurisdictions to obtain full and complete authority to carry out the orders and provisions in said interlocutory order and decree contained.

Exception LXVII.

Said court erred in ordering and decreeing in and by and as part of the said interlocutory order and decree

that the defendants, their and each of their agents, directors, officers, servants, representatives, the employees of Presidio Mining Company, and all other persons, turn over and deliver to such receiver or his duly constituted representatives any and all property, real or personal, or held in trust, belonging to said corporation, and also Section 5, including books, records and papers of said corporation; that said B. S. Noyes and Wm. S. Noyes likewise turn over any and all books, records, documents and papers in their possession or under their control, pertaining to the business of said Presidio Mining Company or Section 5; and that each, every and all such directors, officers, agents, employees or persons obey and conform to such orders as may be given to them from time to time by such receiver or his duly constituted representatives in conducting the operations of said Presidio Mining Company, its properties, Section 5, and in discharging his duties as such receiver; and that said defendants, their, and each of their, agents or representatives, and all other persons be restrained and enjoined from interfering in any manner whatever with the possession or management or operation of any part of the said properties over which said receiver is hereby appointed, or interfering in any manner to prevent the discharge of his duties.

Exception LXVIII.

Said court erred in ordering and decreeing in and by and as part of said interlocutory order and decree that said receiver continue in office pursuant to the terms and under the conditions mentioned in said

interlocutory order and decree, until the final termination of this suit, or until otherwise ordered by said court.

Exception LXIX.

Said court erred in failing to give, make, render and enter its order and decree in said action, denying the appointment of a receiver herein.

Exception LXX.

Said court erred in giving, making, rendering, entering and filing said interlocutory order and decree appointing a receiver in the above-entitled action, upon the pleadings and record in said action.

Exception LXXI.

Said court erred in giving, making, rendering and entering and filing said interlocutory order and decree appointing a receiver herein, in this, that said interlocutory order and decree appointing said receiver was and is contrary to law and to the case made and facts stated in the pleadings and record in said action.

In order that the foregoing assignments of errors may appear of record, said defendants present the same to said court and pray that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided; and said defendants, appellants herein, pray the reversal of the above mentioned interlocutory order and decree heretofore given, made, entered, entered and

filed in the above-entitled court, in the above-entitled action appointing a receiver.

Dated San Francisco, California, March 19, 1918.

PRESIDIO MINING COMPANY,
a Corporation,
WM. S. NOYES,
B. S. NOYES,
L. OSBORN,
JOHN W. F. PEAT,
L. M. DOHERTY,
Said Defendants and Appellants herein.
By R. T. HARDING,
H. E. MONROE,
Their Solicitors.

United States of America,
Northern District of California.—ss.

We, the undersigned, solicitors for the above-named defendants, appellants herein, do hereby certify that the foregoing assignments of errors are made on behalf of said defendants, appellants herein, and are in our opinion well taken, and the same now constitute the assignments of errors upon the appeal herein prayed for.

Dated San Francisco, Californa, this 19th day of March, 1918.

R. T. HARDING,
H. E. MONROE,
Solicitors for said Defendants,
Appellants herein.

Received a copy of the foregoing assignments of errors this 19th day of March, A. D. 1918.

WM. F. ROSE,
Solicitor for Above-named
Complainants.

(Endorsed): Filed Mar. 19, 1918,
W. B. Maling, Clerk,
By J. A. Schaertzer,
Deputy Clerk.

THE PROPRIETY OF DISPOSING OF THE MERITS OF THE CASE, AS WELL AS OF THE SPECIFIC COMPLAINTS OF APPELLANTS RELATIVE TO THE MATTERS OF INJUNCTIONS AND OF RECEIVERSHIP, IS RESPECTFULLY SUBMITTED FOR FAVORABLE CONSIDERATION BY THIS COURT.

It is the earnest hope of these appellants that this court will go fully into the merits of this cause, and consider and dispose of those merits, as well as the objections of these appellants to these injunctions and to this receivership. It is earnestly pressed upon the attention of the court that this procedure is justified by the dependency of the proper disposition of all matters complained of, upon the disclosures of the main case. It is submitted that the right, if any, of this complainant to these injunctions and to this receivership is one which must be based upon a foundation of some sort; and that since the claims of complainant are sought to be predicated upon the alleged disclosures of the case as a whole, the inquiry continually and naturally recurs whether any foundation was laid in the main case for the issuance of these injunctions or the establishment

of this receivership. No one can, indeed, we submit, read with any degree of attention the interlocutory decree without observing how the mind of the learned judge of the court below found a justification for the application of these drastic remedies in the conclusions which he drew relative to the case at large; he made the granting of these remedies a part of this decree, and they must, we submit, abide the fate of the decree itself; and if the main case, properly analyzed, fails to furnish a sufficient basis for the granting of these remedies, that, we think, is an argument to which these appellants may of right appeal. But not only is the propriety of investigating the merits of the case at large justified by the proper disposition of our complaint concerning these injunctions and this receivership, but, we submit, a full inquiry into the merits of this cause is further justified by the abbreviation of litigation. It seems like a commonplace to say that it is the constant effort of the courts to get all the light possible upon a given controversy for the purpose of reaching the real merits thereof; instances of this effort might readily be suggested (*Holmes v. Goldsmith,* 147 U. S. 150); it cannot for a moment be supposed that this complainant has failed to present to the lower court all of the proof of which he was capable; and where all the facts are exposed, why not terminate the dispute?

Not only, however, is the course which we are suggesting justified by the considerations just intimated, but it is also justified, we think, by what we believe to be the practice of the courts. Whatever may have been the earlier conflict upon the question whether this

appellate court will enter a decree upon the merits of the whole case when the case has been appealed under the Acts of 1891 and 1900 (now Section 129 of the Judicial Code), the rule seems now to be established that where the nature of the case permits, the appellate court will end the litigation and enter a decree upon the merits; and this procedure is, we submit, particularly applicable where, in determining the propriety of an injunction or a receivership, the whole merits of the case are involved, or where it should appear that the decree or order appealed from had no real equity to support it :

Smith v. Vulcan Iron Works, 165 U. S. 518;
Re Tampa Suburban Ry Co., 168 id. 588;
Harriman v. Northern Securities Co., 197 id. 287;
Chapman v. Yellow Poplar Lumber Co., 143 Fed. 204, 205;
Co-operating Merchants Co. v. Hallock, 128 id. 596-598;
Berliner Gramophone Co. v. Seaman, 110 id. 33;
Tornanses v. Melsing, 109 id. 710;
Texas, etc., Mfg. Asso. v. Storrow, 92 id. 10;
Clarke v. McGhee, 87 id. 789;
Carson v. Combe, 86 id. 210;
Knoxville v. Africa, 77 id. 502;
Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 id. 545.

And since the propriety of these injunctions and this expensive receivership turns, principally, upon the foundation, if any, sought to be laid in the main case, why depart from the practice of the courts by refusing

to consider the case as a whole? Why should not the issue of fraud or no fraud upon the part of Mr. Noyes, or any other of these defendants, be settled and determined on this appeal, once and for all, without subjecting these parties to additional litigation?

And finally we respectfully submit that the propriety of considering and disposing of this case as a whole upon all of the issues presented, is justified, not only by the considerations which have hitherto been presented, but also by the harshness of the remedies themselves—drastic remedies which are applicable only in extreme cases. When we consider the absence from complainant's pleadings of any proper showing of irreparable injury (*Indiana Mfg. Co. v. Koehne,* 188 U. S. 681, 680), when we recall the failure of complainant to impeach the solvency of these defendants or their ability to respond to a decree (*Am. Mang. Steel Co. v. Alaska Mines Corp.,* 250 Fed. 614, 615), when complainant's own showing exhibits this company as a going concern (*Gutterson et al. v. Lebanon I. & S. Co.,* 151 Fed. 72, and cases cited; *Elliott v. Superior Court,* 168 Cal. 727; *Fischer v. Superior Court,* 110 id. 129) entitled to the encomiums so lavishly bestowed in the original bill but so uncandidly suppressed thereafter, and when we reflect that no more effective *lis pendens* than this very litigation could well be imagined (since even he who could be induced to purchase a lawsuit *pendente lite,* must take subject to the event of the *lis* (*Barstow v. Beckett,* 110 Fed. 826, 827-8), we cannot fail to be impressed by that severity of judicial action which, upon the complaint of "one man", removes from the normal governors of the corporation, against whom no other

stockholder has come forward with any sort of grievance, that authority with which they are vested according to law (*Cowell v. McMillin,* 177 Fed. 25, 39 *ad finem*), and banishes this company, its officials, property, affairs and future to the keeping of the stranger. It is but natural, we think, that, under such anomalous circumstances, those who are aggrieved thereby, conscious of no wrong or desire to wrong, and entitled to point to their many years of business life and labor during which no aspersion has ever been cast upon them, their acts or their good names, should hope for the most complete investigation of the charges made, to the end that entire justice may be done to all concerned.

Another viewpoint of the situation may be stated as follows:

As the appeal is from the order appointing a receiver, not only of all of the company's property, not only of Section 8, but also of Section 5, and as the legal title to Section 5 stands in William S. Noyes and is claimed by him as his individual property, it of necessity follows that this court must, in order to decide the propriety or impropriety of the appointment of a receiver over Section 5, find and decide whether the equitable title to Section 5 is vested in William S. Noyes or in the Presidio Mining Company; and in order to determine this controversy, this court must necessarily go into the merits of the case as a whole.

THE REAL NATURE OF THE ACCUSATION MADE.

Putting together the essential declarations of the complainant's pleadings when stripped of their epithets, de-

nunciations and other verbiage, the declarations of the complainant's solicitor made during the course of the hearing, and the views expressed by the learned judge below, both in his interlocutory decision and in his interlocutory decree, one perceives that the real heart of this case is the acquisition by Mr. Noyes of Section 5. The amended bill, in paragraph 12 thereof, summarizes certain transactions occurring after the acquisition of Section 5; thus it speaks of the lease of January 29, 1913, of the election of Mr. Noyes as a director on January 31, 1913, of the resolution of February 15, 1913, of payments made to Mr. Noyes during 1913, of the stockholders' ratification of October 6, 1913, of the contract of November 19, 1913, and the borrowings and authorized indebtedness of 1913, "all of which acts, deeds and transactions", the pleading declares, "are hereinafter more fully set forth". But when we turn to the hearing, with the purpose in mind to get at the real contention of this complainant, we find that contention thus stated by his solicitor:

> "Mr. Rose. Our claim is this, our whole contention is this: that Mr. Noyes borrowed the money and gave his personal notes, for instance, one for $10,000, another for $10,000 and another one for $5,000, and with that money he paid to the stockholders of the Silver Hill Mill and Mining Company the sum of $24,000, but that the notes themselves which he gave, from which these moneys were paid, were not paid until a year or year and a half thereafter that particular period, and the moneys were taken from the corporation."

And certainly, so far as the learned judge of the court below is concerned, we find him describing the acquisition of Section 5 "as the main matter for consideration in the case".

Plainly, therefore, the object of cardinal interest in this cause is Section 5—a parcel of land never originally purchased by the Presidio Mining Company, never standing in the name of that company, never conveyed to or "owned" by it; a parcel of land which the company was financially incapable of purchasing; a parcel of land which, when offered to the company at cost, was rejected by it because of financial inability to purchase; and a parcel of land to obtain control of which is the scheme of this complainant—a scheme sought to be furthered by impressing upon this land a trust for this company, a chameleon trust that at one moment masquerades as a resulting trust, but in the next moment struts in the borrowed robes of a constructive trust. Consequently, this cause does not involve a tract of land which originally belonged to the company, but which by a process really fraudulent was sold to or leased by any person whomsoever, to the injury of the corporation; nor does this cause involve the sale or lease of land originally owned by the corporation, by the majority stockholders to themselves or to one of their number in a manner or by means really fraudulent; nor does this cause involve the deprivation from any minority stockholder, by really fraudulent processes, of any of his just rights *quoad* a parcel of realty originally owned by the company; nor does this cause involve an attempt by the majority stockholders to obtain, by fraudulent processes, gain for themselves at the expense of the minority out of corporate property; nor does this cause involve the sale or lease to this company by a majority stockholder or director, of a parcel

of land conceded to be his, at an "exorbitant" or "enormous" figure—such a conception of the cause would be at war with the views of complainant, according to which the parcel of land is not conceded to have rightly belonged to Mr. Noyes at any time; nor does this cause involve the claims or rights of creditors—creditors are in no way concerned herein.

In December, 1912, and up to January 31, 1913, Mr. Noyes was not a director of the company; at that time, from causes and circumstances which will hereafter be explained, the company was moribund; at that time the opportunity presented itself to Mr. Noyes—then a minority stockholder, who was under no duty, authority, agency or direction to purchase land for a prostrated principal, or to refrain from purchasing for himself, and under no obligation to endow that prostrated principal with land purchased by his private funds or funds obtained upon his personal credit, at his individual risk—to acquire a section of land which the company had neither the intention, the desire, nor the ability to acquire, and in which the company had no right, title, interest or estate whatever, and the purchase of which by this stockholder in no way interfered with any of the plans of the company, and in no way operated any detriment to it; and therefore the main and principal question in this cause is whether the purchase of Section 5 by Mr. Noyes under these circumstances was or was not a fraud upon this company? The accusation of this complainant is that this acquisition was such a fraud; the reply of the defendants is that it was not; and herein lies the heart of this case.

GENERAL HISTORY OF THE EVENTS LEADING UP TO THIS LITIGATION.

We are of the opinion that it will be of assistance to the court if in a general way we describe some of the principal events leading up to the present litigation, without going too much into detail, the purpose being to present a general historical survey, as extracted from the record, so that a consecutive view of the whole matter may be had before descending to the specific details of particular phases.

In approaching this recital, we beg to point out that, quite regardless of any designation which may be attached to any one of these defendants, whether described as trustees, fiduciaries, confidential agents, or what not, it should be borne in mind that there exists in their favor certain presumptions of fair dealing and of correctness of purpose and act to which they have a clear right to direct attention. In as much as the cause at bar does not involve an accusation of corporate negligence, injudiciousness or mismanagement, in as much as no complaint is made against any assigned error of judgment by any of these defendants, and since the accusation is one of downright deliberate fraud and conspiracy, it would seem that the occasion is a proper one upon which to direct attention to the presumptions that we have mentioned. The charge made here is one of wanton corporate fraud and theft—of things done consciously with an evil intent—of conduct that can not well be explained, if true, upon any innocent theory; no accusation could be more serious; but, fortunately, the law protects those thus accused by indulging every

presumption against the accuser, and by insisting that unless the accusation be established by evidence so clear, unequivocal and convincing as to remove that strong presumption of innocence and fair dealing, which has so firm a foundation in the law, the complainant must fail (Cal. C. C. P., Sec. 1963, subd. 1, 15, 19, 20, 28, 33; *Fox v. Mining Co.,* 5 Cal. Unrep. Cas. 980; *Ryder v. Bamberger,* 172 Cal. 791; *Gaines v. New Orleans,* 73 U. S. (6 Wall.) 642, 707-8; *Farrar v. Churchill,* 135 U. S. 609; *Lalone v. U. S.,* 164 id. 255; *Moses v. U. S.,* 166 id. 571, 584; *Rogers v. Virginia Carolina Chemical Co.,* 149 Fed. 1; *Carson v. Alleghany Glass Co.,* 189 id. 791, 805, where the court said, "there is a presumption of honesty and fair dealing in the business transactions of mankind, and fraud, to be established, must be strictly proved").

This barrier of presumptive innocence of fraud, and this presumption of fair dealing, are strengthened in this cause by the fair character of the persons accused. It appears from the record that for many years past they have been engaged in these mining enterprises, but no responsible voice has hitherto been raised to criticise them in any way; for many years past their standing has been excellent; and upon an accusation of this character, this factor is one of importance as repelling the thought of fraud or unfair dealing. Ever since the organization of the Presidio Mining Company in 1883, Mr. William S. Noyes has been its superintendent; for many years past, Mr. B. S. Noyes has been a member of the bar, practising his profession in San Francisco, and lately giving attention to various mining

enterprises; the personal dereliction of Osborn, wholly antecedent to, and quite disconnected from, the purchase of Section 5, wholly peculiar to himself, and in no way participated in by any other defendant, was as keenly regretted by the other defendants as it could possibly be by any person whomsoever; no impeachment of Mr. Peat's character can be extracted from this record; and a moral strabismus would be the most charitable explanation for criticism of Miss Doherty. Is it to be believed that all of these people, wholly uncontaminated (save Osborn) by previous participation in evil practices, without preliminary training even in the contemplation of corrupt conduct, suddenly, all at once, and while in the normal enjoyment of their faculties, reversed their mental habits of many years, and upset all their settled traditions, to plunge into the guilty conspiracy and wanton fraud with which they are charged? Is it within common experience that the soil of long established integrity bears spontaneously the fruits of corruption? Can it be believed that these defendants, at one single bound, sprang from a condition of unimpeached integrity, without the slightest intervening preparation, to the grade of guilt asserted by this complainant? A claim of this kind does not, we submit, accord with ordinary human experience; and looking at the personalities of these accused persons, looking at the situation as any fair-minded person of ordinary intelligence would look at it, without antecedent anxiety to discover something foully done, and without conscious or unconscious distortion of facts, can it be denied that the strong presumption of innocence and fair dealing

is strengthened as one looks back over the tract of time since 1883, and observes the total absence of complaint or criticism until the filing of this recent bill of complaint? Any person accused of fraud may, indeed, along and in connection with and in addition to other things, refer to his good standing; he may well appeal to the improbability that a person of good character would have conducted himself as alleged; he may urge that his previous good standing creates a presumption that he did not commit the fraud charged; he may rightfully contend that the presumptions of innocence and of fair dealing are strengthened by his past good record; and he may properly point out that good character is particularly significant in cases of circumstantial evidence, and in cases involving intent.

These defendants have been men of business standing and of affairs for many years past. If, during all these years, they had ever participated in any wrong doing of the type now asserted, it is entirely certain that the energetic complainant, Overton, would not have failed to discover and proclaim that fact; although it is a familiar rule that in cases of this class other similar conduct to that alleged is frequently received in evidence as competent to light up the immediate situation, yet nothing of that kind was ever attempted; and the record here is quite barren of any such proof—a silence that in a controversy of this character is vocal with significance; and the harsh, even malevolent, scrutiny to which the business lives of these defendants were subjected is advantageous to them in this respect that it entitles them to be considered innocent of all extraneous im-

proprieties, and to deny the validity of any adverse inference attempted to be drawn as to the present situation from any extraneous circumstance. Indeed, as one looks back over the whole history of this corporation, from its organization in 1883, down to the present time, one is reminded of the language of this court in a recent opinion, where it was observed that:

> "We find no satisfactory evidence upon which to base a conclusion that the trustees who voted to increase McMillin's salary, acted either corruptly or under false motives; they were men of business standing, holding very responsible positions in mercantile affairs, and it is not at all reasonable to believe that their action as directors was prompted by any course other than a careful regard for what seemed to them to be the interests of the corporation."
>
> *Cowell v. McMillin,* 177 Fed. 25, 41.

The history of the Presidio Mining Company separates itself conveniently into three periods: the first of these periods begins with the organization of the company in 1883, and terminates with December of 1907, when the company closed the year with an operating loss of $11,505.91 (Klink-Bean Co. Report, Schedule 2, p. 994). The second of these periods begins with January of 1908, and ends with December of 1912, when the company closed the year with an overdraft of slightly over $3000 (Klink-Bean Co. Report, Schedule 15). And the third of these periods begins with January of 1913, when the company made an operating loss of $2377.96 (Klink-Bean Co. Report, Schedule 15), and ends with December of 1917, when the company closed the year with a new and improved cyanide plant, a large stock of mining and milling supplies, with bullion and a large balance of

surplus cash to its credit (see summary at top of page 365). The contrast between the deficit of 1907, and the overdraft of 1912, upon the one side and the condition of the company at the end of 1917, upon the other, should go, we believe, a very long way to refute the extravagant assertions made by this complainant; that contrast speaks for itself; and it certainly creates no additional presumption against the administration of the affairs of the company by these defendants.

The record shows that the Presidio Mining Company was incorporated in November, 1883; that between January 1, 1885, and 1905, the mine had a period of considerable prosperity, milling, during that period ore that yielded from $30 per ton down to $10.35 per ton, with working costs varying from $18 per ton, down to $9.83 per ton. During that period of twenty-one years, the mine paid, not only for all of its equipment, but also some $760,000 in dividends (Defts.' Exhibit NN, last column form 7; Book of Exhibits, p. 86)—or about five times its capital stock. It will, however, be observed that for the last four years of that period, the dividends were very light. During 1906 and 1907, the mine made a loss.

When the company was organized in 1883, the defendant William S. Noyes was appointed superintendent of the company's mining operations, and he has had charge of the same until the receiver took possession in February, 1918. Until the year 1901—a period of about eighteen years—Mr. Noyes resided at the mine, and gave all of his time to the mining operations. In 1901, he made an arrangement with Mr. Boyd, then the presi-

dent of the company, whereby he removed from the mine to San Francisco (650); but this removal did not terminate his supervision of the mining operations; and although he opened an office for the practice of his profession as a consulting mining engineer, nevertheless, he has ever since looked after the mining operations of the company, being assisted therein by his previous eighteen years experience with the mine, by a constant and regular series of reports at brief intervals from the mine, by a mine superintendent on the property, and by repeated and lengthy visits to the mine itself whenever necessary throughout the year (651-652).

This mine is what is known as a pocket mine, the ore bodies consisting of replacement deposits in limestone, which are extremely irregular, both as to quantity and value. Any attempt to judge from exterior indications as to either the quantity or the value of a face of ore in sight, would be mere surmise and conjecture—nothing more, in fact, than a guess which, as likely as not, would turn out to be ill-founded. For the purpose of treating the ores obtained from its mine, Section 8, the company, as early as 1885, installed a pan amalgamation plant, the operation of which was continued until it was superseded by the cyanide plant about May, 1913. During the interval between 1885 and 1905, there were many years when the ores showed considerable value, running as high as $24.53 for 1888, $21.94 for 1889, $30.11 for 1890, $25.20 for 1891, $20.80 for 1892, $19.22 for 1893, and so on to $10.35 for 1905, the average value of the ore for this twenty-year period being $14.80. The results of operation during this

period permitted the payment of dividends; but, after 1905, such changes supervened, not only in the low grade of the ore accessible, not only in the reduced price of silver, but also in the increased cost of operation as contrasted with the low grade of ore operated upon, that no further dividend was practicable. The general conditions, not only in the mine, not only in the reduction works, but also in the market for the completed product, became such in 1907 that it was impossible any longer to operate the mine at a profit by the pan amalgamation process. During the year 1907, the cost of the production of silver at the company's mine and plant was $.6762 per ounce of fine silver, and the average selling price was $.6615 (715); but the company struggled through that year only to find itself at the end of 1907, with an operating loss of $11,505.91. In this condition of things a meeting of the board of directors was held on December 13, 1907, at which meeting all of the directors were present; and a resolution was unanimously adopted, ordering and directing

> "that the mining and milling properties of this company located in Presidio County, State of Texas, be closed immediately and all employes discharged and the expense of operating the same be discontinued; and be it further resolved that the president of this company be requested and instructed to carry these resolutions into effect immediately." (834)

Upon the adoption of this resolution, and at the same meeting, Mr. John F. Boyd, who for many years prior to this time had been president of the company at a salary of $200 per month, resigned as president and director of the company, and the present defendant J. W. F. Peat

was elected a director and president of the company. When the news of the adoption of this resolution reached Mr. William S. Noyes, he succeeded in persuading the directors to rescind the resolution and to continue prospecting work in the mine (653). On the same day, December 13, 1907, when the mine was ordered closed down, and when Mr. Boyd retired from the presidency and directorate, he and his wife transferred all their stock, aggregating 57,213½ shares, to L. Osborn, with the direction that William S. Noyes receive one-half thereof if he should desire to take it (653-657); and Mr. Noyes advised Osborn that he would do so, the actual transfer upon the books of the company not being made until later, under circumstances hereafter to be narrated.

Then ensued the second of the periods above mentioned—the period beginning with December, 1907, with its deficit, and ending with December, 1912, with its $3000 overdraft.

The example set by Mr. Boyd in transferring the Boyd stock to Osborn was not without effect upon the other stockholders. While Mr. Noyes agreed to take the one-half of the Osborn stock as Boyd had desired, yet the formal transfer upon the books was not put through because, as Mr. Noyes tells us, speaking of this stock:

> "On December 12th (1912) 28,607 shares of stock was transferred from Osborn to me. Osborn had been holding that stock in trust for me since December, 1907. I had not had it transferred, because the company was in such a precarious condition that I was staying, as all the rest of the big stockholders did, off of the books. When we

> decided to make an attempt to do this work (install the cyanide plant), I told Osborn to transfer it to me— that if there was any responsibility to be assumed, I was going to assume my share of it. It was known that I was going to endeavor to put in that cyanide plant if I could." (674)

Not only does this statement stand wholly uncontradicted, but, we observe, so infectious was the example of Boyd, so far as the "big stockholders" were concerned, that 110,170 shares changed hands between December, 1907, and December, 1908. Thus, on December 13, 1907, the Boyd stock aggregating 57,213½ shares went out of Boyd's name and into that of Osborn; on February 10, 1908, the India Scott Willis stock, aggregating 36,956⅔ shares went out of her name and into that of Miss Doherty; and during September and December, 1908, the Mills stock, aggregating 16,000 shares, went out of his name and into those of Overton —10,000 shares, Martin— 2500 shares, Kathleen C. Kline—2500 shares, and Overton—1000 shares. This period was one of constant struggle with adverse conditions, both within the mine and without. Within the mine, low grade ores were met, and the cost of extraction per ton increased; and without the mine and in the market for silver, depreciation prevailed. The average ore value during this period was $9.14, but the average cost of extraction was at the mine $9.2331, and including the San Francisco expenses $9.551. The result of these adverse conditions was the deplorable condition into which the company had fallen in December, 1912; the ores from Section 8 were of low grade; the cost of extraction was high; the price of

silver was low; and the outlook and prospect for the company was quite without hope.

For some time prior to December, 1912—indeed, as far back as 1907, Mr. Noyes had made a report to the company, referring to the depreciated ore values and the high cost of operation, and recommending the installation of a cyanide plant (Exh. E, p. 658). When the company was organized, the best method then known to science for the extraction of silver was the pan amalgamation method; but by 1907, such developments had been made that the cyanide process was perfected, whereby the cost of extraction of silver was very materially reduced; and in his efforts for the welfare of the corporation, Mr. Noyes directed attention to the cyanide process as offering the sole means of escape by the company from its surrounding and increasing difficulties. When Mr. Noyes made this original report in 1907, Mr. Boyd sent it to the stockholders, advising them that

> "if the proposed changes are made (and from the present outlook we must do that or stop work and abandon the mine) an assessment on the stock of about ten cents a share will be necessary; therefore I request the stockholders to signify their wishes in the premises to the company".

This communication by Mr. Boyd was dated February 21, 1907 (663), and it was received with chilling frigidity by the stockholders—so much so, in fact, that the proposed assessment was never levied, or any contribution offered to assist the projected improvement. An interesting sample of this attitude of the stockholders may be found in the correspondence of Mr. Mills, donor

of the stock now held by the complainant Overton. On March 1, 1907, Mills received Boyd's note with its enclosure, but neglected even to reply to it. Thereupon, after waiting some six weeks—until April 18, 1907—Boyd wrote again to Mills; and this time, Mills replied apologizing for his "gross neglect" (Exh. 3, p. 668). In this reply, Mills recognizes that there is such a thing as a "silver slump", declares that "we did not feel like joining you in the cyanide proposition, and do not yet", considers it "rather risky to put $70,000 in the business *as it stands now"*, suggests shutting down the mine for a year, and thinks that if the country settles down "and silver rises to, say, 60 cents" "we *might* start the cyanide process". Depressing as this was, Boyd apparently recurred to the subject, because we find Mills, under date of September 16, 1907, declaring to Boyd (669-670) that "I take it for granted that you would not be willing to put in the new process under existing circumstances", and adding the comforting information that "Mrs. Orndorff is living with us at present and she agrees with me that it would be inadvisable to make the investment under the present circumstances". (And just here, one is tempted to ask, by the way, bearing in mind the claims of this complainant in his bill, whether this agreement in opinion between Mrs. Orndorff and Mr. Mills justifies the pretence that Mr. Mills "dominated" or "controlled" Mrs. Orndorff?). Although these letters were sufficiently disheartening, yet between April 18, 1907, and June 2, 1908, Boyd wrote twice to Mills, and judging from Mills' reply (666), the latter's realization of the desperate plight of the com-

pany was so keen that the governing thought in his mind was the avoidance of pecuniary contributions:

> "I have lost my confidence in it (the Presidio Mine), however, and hardly expect to receive anything further, but I want to ask you this question: Am I in any way personally responsible for future assessments should it run into debt?"

Clearly, Mr. Noyes, anxious and hoping for the betterment of this company, had little to expect in the way of assistance from a stockholder in this frame of mind; and this view is emphasized by the celerity with which Mills hastens to follow Boyd's example in getting off the books. Thus, about two weeks later, on June 18, 1908, Mills writes Osborn thus:

> "Mr. L. Osborn,
> Secretary, Presidio Mining Company,
> 204 California Block, San Francisco, Cal.
>
> "My Dear Mr. Osborn:
>
> "Mr. Boyd has informed me that he has disposed of his holdings in the Presidio Mine to you and has retired from the presidency.
>
> "Under the circumstances I feel disposed to dispose of my interests. Are you willing to make me an offer? If, so, please do so. You are aware of the extent of my holdings.
>
> "Perhaps Mrs. Orndorff would be willing to consider an offer for her holdings, also.
>
> "Yours very truly,
> "Anson Mills." (665)

It does not appear, however, that Osborn made any offer, but, nevertheless, we perceive in the letters dated September 7, 1908, and December 22, 1908 (666-7), sufficiently satisfactory evidence of the desire of Mills to get his stock out of his name; but nowhere in this record is there any proof that Mills' donees ever paid

him a dollar for any of this stock; *quod non apparet, non est* (Cal. Civil Code, Sec. 3530; *The Clara,* 102 U. S. 200).

The net result was that the efforts of Mr. Noyes in 1907, to establish this cyanide plant, failed, not because of any lack of interest upon his part, but because of the apathy of the stockholders and their disinclination to assist.

During the period, therefore, between 1907, and 1912, the company operated under the old method of pan amalgamation; and during that period made something like $30,000, out of which, in 1912, $18,000 was expended in the installation of an internal combustion oil engine. To express the conditions existing at the mine at the end of 1912 as briefly as possible, it may be said that there were ore reserves there running from 14 to 16 ounces per ton which could be worked only at a loss by the pan amalgamation process, and the company faced the situation where it must either install the cyanide plant or cease operation. Naturally, under these circumstances, Mr. Noyes, who had devoted the best years of his life to the service of this company, and who did not desire to see it go under, again pressed his recommendation that a cyanide plant was indispensable to the salvation of the company; and he advised the principal stockholders that if the cyanide plant were installed, the company would probably have a prosperous business for years; but if not, the end was in sight. The stockholders whom he consulted were Mrs. Willis, Mr. Osborn and Miss Doherty, who, together with himself, owned or held in trust over 97,000 shares of the capital stock of the com-

pany out of a total of 150,000 shares. These consultations took place during October, November and early December, 1912; and these majority stockholders expressed themselves as being desirous that the plant should be installed if that result could be accomplished without imposing any assessment upon them; and they suggested that Mr. Noyes complete the estimate of costs and endeavor to borrow the money from his friends. Mr. Noyes left San Francisco for the mine on December 16, 1912, for the purpose of installing this cyanide plant. He estimated that seventy or eighty thousand dollars would be required to install the plant and the tramway which that plant would necessitate. Upon arrival at the mine, Mr. Noyes consulted with the local superintendent, and the decision was reached to make the attempt to install the plant. For this purpose, they obtained bids for the steel work from the El Paso Foundry and Machine Company, which company agreed to give ninety days credit from the date the mill started, this item amounting to $12,000. Mr. Noyes then arranged with Mr. E. G. Gleim, a local merchant, for a loan to the company of $15,000. Later on, Mr. Noyes made an arrangement with the firm of Gregg and Gleim to build a tramway 5700 feet long, operate it for a year, and then sell it to the company.

The financial resources of the company available toward the installation of this cyanide plant as of January 1, 1913, are described by Mr. Noyes as follows:

> "As to the condition of the finances of the Presidio Mining Company, with regard to funds that were available for the purpose of the installation of that cyanide plant, on or about January 1st, 1913, I was at Shafter,

Texas, then; we had about $15,000 or $17,000, supposed to be in the treasury, and the current bullion in transit, with the December bills not paid.

"Q. That would leave you net about how much that was available for any new installation that you could put in?

"A. Well, I would have to guess at the bullion in transit; it had not gone forward for the December account; probably, $10,000.

"Q. Of that?

"A. Yes, that would be $27,000. I said I would have to take a guess at the amount of bullion that was in transit; with that, the assets of the company would perhaps be about $27,000; the December bills amounted to about $16,000, leaving $11,000 or $12,000, possibly. That left me about $11,000 or $12,000.

"Q. What did you ascertain later on as to the actual condition of the treasury of the company?

"A. Along about the 19th or 20th of January—of course, the bullion in transit had increased, over the bullion shipped—I discovered that unfortunate shortage in San Francisco; that shortage was $10,689.75." (673)

In this estimate, Mr. Noyes is corroborated by the report of Klink-Bean and Company, which shows the exact resources of the company, on December 30, 1912, to be $13,438.02. From this report we draw attention to the financial condition of the company during the crucial period immediately preceding and following January, 1913 (Schedule 15):

Nov. 30, '12—Cash in bank		$ 8,380.91
	Bullion in transit	10,605.03
	Mine overdraft and unpaid invoices	11,612.44
	Net	$7,823.50
Dec. 31, '12—Bank overdraft		$ 3,303.72
	Bullion in transit	17,523.66
	Mine overdraft and unpaid invoices	1,681.92
	Net	$13,438.02

Jan. 31, '13—Cash in bank		258.94
	Bullion in transit	14,344.16
	Mine overdraft and unpaid invoices	3,581.93
	Net $11,021.17	
Feb. 28, '13—Cash in bank		6,961.79
	Bullion in transit	22,521.94
	Mine overdraft and unpaid invoices	14,224.38
	Net $15,259.35.	

The bullion in transit includes the shipments taken into account as applicable to the current month's operations—although sometimes forwarded as late as the 22nd day of the following month. The "net" does not, therefore, show ready money, but something that will come in during the succeeding month. As a matter of fact, on December 31, 1912, the company had a bank overdraft of $3303.72; and in January of 1913, it made an operating loss of $2377.96. In other words, during this crucial period of time, the company had no financial resources except the following:

November 30, 1912	$ 7,823.50
December 31, 1912	13,438.02
January 31, 1913	11,021.17
February 28, 1913	15,259.35

But, it is constantly to be borne in mind that these net book balances were never in the bank, but, as shown by the Klink-Bean Report, were carried in the "bullion in transit"; and Mr. B. S. Noyes testified that on January 1, 1913, there were no liquid assets except the bullion in transit—that there was some quicksilver which would become an asset when the pan amalgamation mill was shut down (908). It will have been observed that we have pointed out that upon the

arrival of Mr. Noyes at the mine, with the purpose in view of installing the cyanide plant, he obtained certain credit and loans. In this connection it is proper to point out that when Mr. Noyes reached Texas and had made his arrangements for these credits and loans, he became desirous of ascertaining just how much cash was available in the treasury of the company for the cyanide purposes. Mr. Noyes had been giving his attention entirely to the mining side of the enterprise rather than to the bookkeeping side; he did not keep the books, nor were they kept under his direction; his business was with the production of ore in Texas, not with the keeping of books in San Francisco; and while he was familiar with the details of mining operations, he was not familiar with the details of the various accounts in the company's ledger or cash book. He had, of course, general ideas about the condition of the treasury; but when he had laid his foundation by procuring the credits and loans above mentioned, general ideas ceased to be of practical value, and it became necessary to know precisely what cash was available to help out the cyanide installation. To satisfy himself upon this point, he telegraphed to his brother at San Francisco, to ascertain for him how much money was in the treasury of the company; and the result of this action was the discovery of the Osborn shortage, and of the fact that the company did not have over five or six thousand dollars in cash (cf. 908). This was, of course, very disheartening, but so convinced was Mr. Noyes that the rehabilitation of the company depended upon the success of the cyanide

installation that, notwithstanding the shock of this shortage, he determined to go ahead with his plan for the salvation of the company. The result was that the cyanide process was installed, not through any ability on the part of the company to provide the funds for that purpose, but through the hard work, good name, credit and ability of William S. Noyes. The plant was installed at a cost of about $80,000, upon credit and borrowed money; and if there were no other evidence of the decrepit condition of the company at this time, the very fact that this plant was set up upon credit and borrowed money would make that decrepit condition entirely clear; because, since the cyanide plant was an imperious necessity, and the only means to stay the company's ruin, the question naturally would present itself as to why the company should go into debt for the installation of this plant, if it had the funds necessary to install it.

The new plant, with the exception of the tramway, went into operation for a few days in July, was then shut down for nearly a fortnight by a strike, and finally got started on August 1, 1913. This enterprise was financed by Mr. Noyes without assessing the stockholders, by getting credit from the following sources:

El Paso Foundry and Machine Works	$12,061.60
E. G. Gleim, loan	14,000.00
Tramway credit	16,000.00
Wells Fargo Bank, loan	5,000.00
W. S. Noyes, loan	10,000.00
E. G. Gleim, loan	5,000.00

And the results accomplished by the installation of this cyanide plant are briefly that the capacity of the mill was increased from 1750 tons per month to 4700 tons; and that the cost of operation was reduced from $9.23 to $6.61 in 1914, and $4.72 in 1915. And it may here be added that on August 28, 1916, three years after the new plant had started operations (with the exception of the tramway), the company had:

1.	Its $80,000 plant paid for.	
2.	Cash at San Francisco	$ 7,741.97
3.	Cash at Shafter	32,438.94
4.	Bullion at Selby Refinery	11,167.75
5.	Bullion in transit	3,600.00
6.	Mining supplies at Shafter	30,627.78
	Total	$85,576.44

Was it wise or foolish, then, to install this cyanide plant? Was the money well expended? Were the efforts of William S. Noyes directed to the rehabilitation, or to the wrecking, of the enterprise? If his purpose were, personally, to absorb the Presidio Mining Company, what could have furthered such a plan more effectually than the deadening apathy of the stockholders at that critical time? If, knowing what this complainant says he knew, and governed by the motives now attributed to him, he had stood apart and suffered this company to sweep on to its inevitable destruction, and had then taken over the wreck, either personally or by a new organization, what could these coldly recalcitrant stockholders find to say that a reasonable man would give a moment's serious atten-

tion to? How could they profess to transmute into a fraud his passivity succeeding upon an earnest but balked effort to rehabilitate this crumbling company? But he persevered, persevered alone and unaided by a single contribution from this complainant or from any other stockholder; and his efforts have been vindicated by the outcome. Indeed, so well was this money expended that the expenditure extorted from this complainant the following encomium which was part of the original bill of complaint in this action, verified by the complainant, Overton:

> "That thereafter (after March 24, 1915), on his way back East, said W. S. Overton stopped at said Presidio Mine in Texas and then and there noticed the excellent equipment of said plant, and the organization and efficiency of the employees and the operations of said mine and mill."

The insincerity of complainant, exhibited in deleting this passage from subsequent pleadings, does not, however, inspire one with confidence, either in his sense of fair play or equity, or in his vociferous claims. And that these efforts of William S. Noyes for the welfare of this company were vindicated by the results is plain from the statement of the expert selected and commended by the learned judge of the lower court, such expert declaring in his report that

> "we have formed the conclusion that the installation of a cyanide plant by the Presidio Mining Company about January 1, 1913, was advisable. *Naturally, we are basing our conclusion upon the results shown by subsequent years*".

It may, indeed, be added that at the hearing, the complainant's solicitor in effect admitted that there

was no fraud in connection with the installation of the cyanide plant; because, when William S. Noyes was asked whether he had a tabulation showing the cost of the cyanide plant, the following occurred:

> "Mr. Noyes. I have a tabulation in regard to the cost of the cyanide plant, which I prepared from the company's books, the vouchers as we paid them. I have recently made that tabulation. I summarized them afterwards. I have compared it with the books of account at the present time to show whether the tabulation I have is in accord with the books of the company. The cost of the cyanide installation corresponds to the ledger, $33,582.39—that is for the cyanide plant alone.
>
> "Q. Have you got any tabulation showing what the surface tracks cost?
>
> "Mr. Rose. I think we could stipulate as to all of these different costs. I do not think there is any question about them. I have no objection to showing how much was paid for the installation of the cyanide plant and the tramway. We have been over the books ourselves, and we know what figures are shown by the books, and presumably those are the amounts which were paid; $35,000 for the cyanide plant, approximately $20,000 for the tramway and $24,000 for track improvements on the property. We admit those figures." (678)

The actual summary of all the costs of the installation of the plant, including the improvements in the mill and surface tracks, is given by Mr. Noyes as $79,359.03; and the examination by Klink Bean and Company covered the period of time during which the cyanide plant was installed, but their record contains not one word even hinting at any fraud regarding the expenditure of any moneys.

It was during the preparation for the installation of this cyanide plant that the Osborn shortage came to the knowledge of Mr. Noyes. Osborn had been secre-

tary and treasurer of the Presidio Mining Company for very many years. He had been associated in business with Mr. Willis, husband of India Scott Willis, and between his family and the Willis family there was a great friendship, Mrs. Willis taking a special interest in Mrs. Osborn and in Mrs. Osborn's children. And this friendship included also the Boyd family. Boyd had been president of the Presidio Mining Company for many years and constantly associated with Osborn; and the three families of Willis, Boyd and Osborn were bound up together, not only by business relations, but also by social ties and long continued friendships.

In 1907, when the outlook at the mine was so discouraging that it was ordered shut down and the employees discharged, Boyd resigned as president and director of the company, and Peat took his place. Boyd's motives in thus resigning in the face of the adverse conditions at the mine and in the market for silver will be discussed hereafter, but, at this time, he transferred to Osborn his stock holdings in the company, stating at the same time his desire that William S. Noyes, whom Boyd had known for a very great many years, should be entitled to one-half of the stock in question, if he should desire to take it. The transfer of this stock from Boyd to Osborn took place on December 13, 1907; and on the following day, December 14, 1907, William S. Noyes being at that time at the mine in the State of Texas, Osborn wrote Noyes advising him of this Boyd transaction. This letter does not appear in the statement of evidence.

Thereafter, and on the 25th day of December, 1907, Osborn wrote again to Noyes advising him of the situation; and this letter is preserved in the statement of evidence. Not long after, upon his return to San Francisco, Mr. Noyes told Mr. Osborn that he would take the one-half of the stock which had been referred to by Mr. Boyd in his transfer to Mr. Osborn. These events occurred at the end of 1907; but from the time of the great fire in San Francisco, on April 18, 1906, down to January, 1913, Osborn had been taking moneys from the funds of the company and applying them to his own uses. His peculations amounted to between ten and eleven thousand dollars. When Mr. Noyes telegraphed from Texas to California to ascertain what funds were in the treasury and available for the cyanide installation, he was shocked to learn of these defalcations of Osborn—defalcations which as already suggested threw upon the shoulders of Noyes as heavy a burden as he well could carry. Immediately upon learning of these defalcations, Mr. Noyes wrote to Mrs. Willis the letter of January 23, 1913, which is set forth in the statement of evidence, and which will hereafter be discussed more in detail.

It was about this time,—1912-13—that Mr. Noyes acquired the tract of land known as Section 5. Section 5 had originally been operated by the Cibolo Mining and Milling Company. The Cibolo Company contracted with the Presidio Company to work Section 5, but, in 1897, the ore body in Section 5 became exhausted; and thereupon that contract was abandoned. Later on, the section passed into the ownership of a

man named Lane at $5.00 per acre; Lane formed the Silver Hill Mill & Mining Company; but that company did nothing whatever in the way of developing Section 5. The only just conclusion from the evidence is that the Silver Hill Company held Section 5 on speculation, looking for a buyer. In the early part of 1912, Lewisohn Bros. of New York, mine operators, procured an option on Section 5 and put their engineers in charge for the purpose of examination; the result was that in November, 1912, after the Lewisohn engineers had examined and reported upon the property, its purchase was rejected by the Lewisohns. After the Lewisohn option had expired, Section 5 continued to be held by the Silver Hill Company by a title wholly separate and distinct from that by which the Presidio Mining Company held Section 8. In the fall of 1912, the Presidio Mining Company had no property, possession, claim, title, right or interest in or to Section 5; at that time no relations whatever—not even negotiations—existed between the two companies as to Section 5; there was no trust relation between the companies of any sort; and the two companies were complete strangers so far as Section 5 was concerned. No agreement ever was entered into by the Silver Hill Company to convey Section 5 to the Presidio Mining Company; no agreement was ever entered into by the Presidio Mining Company to purchase Section 5 from the Silver Hill Company; the Presidio Mining Company had no lease or other interest whatever in Section 5; Section 5 was upon the market for sale; and it might have been purchased by Lewisohn or by any other person.

In the fall of 1912, no temporary right of any sort existed between the Silver Hill Company and the Presidio Company whereby any entry by the Presidio Company upon Section 5 could have been authorized or justified; and at that time no negotiations whatever were pending between the two companies for the acquisition of Section 5 by the Presidio Company, nor was the Presidio Company, in view of the low grade of its own ore from Section 8, in view of the low price of silver, in view of the high cost of extraction, in view of the serious depletion of its treasury by the Osborn defalcations, and in view of the large expenditures made necessary by the cyanide plant, in any financial position whatever to acquire Section 5, even if it had desired to do so. Mr. Noyes had learned that the Lewisohn option had terminated with the rejection of Section 5; and while consulting with Mr. Osborn, Mrs. Willis and Miss Doherty, in the months of November and early December, 1912, in regard to the necessity of installing the cyanide plant, Mr. Noyes informed these stockholders that Section 5 would in all probability be on the market for sale, and that it should be purchased by the company. But their attitude in regard to the purchase of Section 5 was similar to their attitude with regard to the installation of the cyanide plant; they had no money for the purchase of Section 5, any more than they had money for the installation of the cyanide plant; and they did not wish to be assessed. It was Mr. Noyes' judgment that Section 5 should be acquired if possible; and before leaving for Texas in Decem-

ber, 1912, for the purpose of installing a cyanide plant, he had provided himself with a credit of $10,000 from Benton Bowers, to be used in the purchase of Section 5 should it be found to be on the market; and later on, while making the purchase, he actually obtained that sum from Mr. Bowers on his (Mr. Noyes) personal notes, and used the money in the purchase of Section 5. While on his way to the mine, Mr. Noyes arranged at Marfa for a further credit of $10,000 with the Marfa National Bank, to be used in the purchase of Section 5, if required. This money was obtained by Mr. Noyes on his personal notes with the endorsement of William Cleveland, a personal friend. At this time, 1500 shares of the capital stock of the Silver Hill Company were outstanding; and shortly after his arrival at Shafter, Mr. Noyes obtained an option on one-half of this stock from H. B. Young, for $10,000; and prior to the 25th day of January, 1913, Mr. Noyes had obtained options on all of the shares of the Silver Hill Company except four shares. On January 25, 1913, he paid for all except 256 shares out of the 1500 shares; of the remaining shares, 252 shares were paid for in March, 1913; and the final four shares were paid for in April. The total purchase price for these shares, as distinguished from the cost of the acquisition of Section 5 by Mr. Noyes, was $24,006. Mr. Noyes made no secret of this purchase. There is no proof that he ever hesitated to express his intention to obtain that section. He discussed that matter, as we have stated, with the principal stockholders of the Presidio Company; he was free to state his intentions in that regard to any person who might choose

to inquire concerning them; and none of the features of affirmative concealment which appear in so many of the decided cases characterized his conduct. And after he had acquired the majority interest in the Silver Hill Company, he gave full expression to all of the facts (629) in the annual report of 1913, which was distributed among the stockholders, which was familiar to this complainant, which was produced upon the hearing from his possession, and which was marked in the cause as his Exhibit 17. And not only did he thus openly and publicly acquire a piece of land which the Presidio Company from financial inability was wholly incapable of itself acquiring, but after he did acquire the section, he offered it to the Presidio Company at cost, but that company, because of its financial inability, rejected the offer.

Then followed a series of events which have been more or less commented upon in the pleadings and the testimony. A lease was entered into between the Silver Hill Company and the Presidio Company whereby the latter company was given the right to operate in Section 5, paying the former company therefor a royalty at the rate of fifty cents per ton of ore extracted from Section 5. This lease was to operate for one year and it contained a clause that it might be terminated upon thirty days notice by either party. After this lease had been made and had gone into effect, Mr. Noyes, on January 31, 1913, for the first time in the history of the Presidio Company,

became a director of that company. Thereafter, on February 15, 1913, a resolution was adopted by the Presidio Company awarding Mr. Noyes $45,000, $11,000 of which was to be paid forthwith, and was so paid, but the balance to be paid was made contingent upon the earnings of the company, it being specifically provided,

> "that if the earnings of this corporation shall not be sufficient to make said deferred payments at the respective times above provided, then said deferred payments shall be made to said Noyes as fast as the earnings of this company will permit".

Mr. Noyes received the $11,000 provided for in this resolution, and immediately loaned to Osborn a sufficient sum of money to enable Osborn to make good the shortage; and after the money had come into the possession of Noyes, he made the loan to Osborn which enabled Osborn to pay back the money to the company that he had abstracted. In return for this $11,000 the company received ore from Section 5, all of which was accounted for in the accounts between Mr. Noyes and the company. When Mr. Noyes loaned the money to Mr. Osborn, Mr. Osborn executed his promissory note to Mr. Noyes, and secured the same by 25,000 shares of the capital stock of the Presidio Mining Company.

Thereafter, it became evident that the lease of January 25, 1913, was grossly unfair to Mr. Noyes; and thereupon a final and definitive agreement was

entered into between Mr. Noyes and the Presidio Mining Company, whereby he and the company divided between them the "net" left after the various charges and expenses had been provided for. In connection with these matters, sundry other questions arose involving the bullion apportionment, the dollar differential, the voting trust, certain side profits, the tramway contract, and the salaries of the officers of the company, all of which will be fully discussed hereafter in their due place and order. Some time after these transactions, Mr. W. S. Overton came to San Francisco to visit the International Exposition, and returning to his Eastern home by way of Texas, visited the mine. The result was that later on he returned to San Francisco, and after a time spent in examining the books and records of the corporation, instituted this suit on July 26, 1915.

For the purpose of illustrating the reasons why there were no dividends since 1905, it may be useful at this point, bearing in mind the grade of the ore, and the price of silver, to tabulate, from defendants' Exhibit NN and from Form 7 attached to plaintiff's Exhibit 19, the elements necessary to a full understanding of this matter:

Year	Yield in Ozs. per ton	Average Price per oz.	Yield per ton	Cost per ton	
1888	27.21	$0.9013	$24.53	$12.04	
1889	24.28	.9045	21.94	17.01	
1890	29.83	1.0093	30.11	18.30	
1891	25.92	.9722	25.20	17.46	
1892	23.84	.8536	20.80	18.07	
1893	23.73	.7681	18.22	16.78	
1894	25.74	.6182	15.92	12.13	
1895	25.87	.6100	15.78	12.30	
1896	27.23	.6425	17.54	11.82	
1897	26.62	.5876	15.64	10.43	Dividend Period
1898	26.09	.5482	14.31	10.24	
1899	22.85	.5730	13.09	9.80	
1900	23.40	.5902	13.81	9.87	
1901	21.16	.5892	12.76	11.26	
1902	20.85	.5183	10.81	10.49	
1903	20.49	.5099	10.43	9.84	
1904	19.82	.5513	10.93	10.19	
1905	17.95	.5767	10.35	9.83	
1906	14.62	.6325	9.22	9.40	
1907	14.76	.6615	9.63	9.85	
1908	19.52	.5299	10.35	9.19	
1909	17.19	.4926	8.47	8.74	
1910	16.57	.5082	8.42	8.84	
1911	19.32	.5152	9.94	8.99	
1912	19.27	.5696	10.97	9.86	Non-Dividend Period
1913	Transition year, 3 months shut down.				
1914	14.22	.5277	7.50	6.21	
1915	12.11	.4793	5.79	4.53	

The figures "7.50" and "5.79" at the bottom of the fourth column, supra, show the gross yield per ton in dollars and cents of the ore that the defendants have had to deal with since their election in 1913, and a comparison with the figures in the same column from 1888 to 1905, makes it plain why dividends could have been, and were, declared up to 1905, and why subsequent to 1905, no dividend could have been declared. Reading down the first column which shows plainly the constantly declining grade of ore, makes clear the quality of the management that can make money during the last two years shown in the table.

From this hasty review, it will, we think, become plain that the date when Mr. William S. Noyes became a director in this company furnishes a convenient line of reference; the amended bill alleges, and the answer admits, that Mr. Noyes became a director of this company on January 31, 1913.

WHERE FRAUD AND CONSPIRACY ARE CHARGED, THEY MUST BE ESTABLISHED BY CLEAR AND CONVINCING PROOF; NOTHING SHORT OF THIS WILL SUFFICE.

It appears to be the fashion in cases of this class to use such terms as "fraud" and "conspiracy" with great freedom. There is hardly an instance to be found in the books wherein, in cases of this impression, complainants have failed quite liberally to bespangle their pleadings with unpleasant adjectives and assertions; but as observed in *Kent v. Lake Superior Co.*, 144 U. S. 75, 91: "Epithets do not make out fraud"; and as re-

marked in *Ambler v. Choteau,* 107 U. S. 586, 591, "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant for the damages and other relief he asks." In other words, it is to the very facts themselves that the courts will look, in cases of this class; and where those facts are really set forth in the bill, to employ a phrase of Mr. Justice Holmes, they "gain no new force from the vituperative epithet". (*Jaster v. Currie,* 198 U. S. 144, 147.) The doing of a lawful act by all the powers enabling one to do it is not fraud and is subject to no legal censure; in such cases, again to employ the language of Mr. Justice Holmes, "the word 'fraud' may be discarded as inappropriate" (*Jaster v. Currie,* 198 U. S. 144, 148; *U. S. v. Isham,* 84 id. (17 Wall.) 496); "if the act of the individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached" (*Doyle v. Continental Insurance Co.,* 94 U. S. 535); and if the actual facts themselves, upon which the charge of alleged fraud is based, do not, in and of themselves, support the accusation, the charge must disappear. It is a mistake to suppose that fraud is a fact; fraud is not a fact in the sense that it is an indi-

viduality, with objective external validity, and capable of being measured by metes and bounds. It is not something that can be poured into a pint pot, or measured with a yard stick, or weighed upon a scale. On the contrary, fraud is a term which indicates an inference arrived at from a number of facts proper—a conclusion drawn by a tribunal from all the facts and circumstances proved in the case. In this respect, as in some others, fraud resembles undue influence, negligence, diligence, for the latter, likewise, are the result of the co-operation of a number of constitutive facts. Fraud, then, is a conclusion from the facts of the transactions involved; but if those facts do not establish that conclusion, the accusation of fraud must be discarded, no matter how frequently repeated, and no matter what the quantity of vociferous asserveration.

In determining the presence or absence of fraud, remote, strained or speculative inferences drawn from uncertain terms are without judicial importance; that conjecture cannot be heaped upon conjecture, or inference piled upon inference, is settled by the highest authority (*U. S. v. Ross,* 92 U. S. 283; *Bank v. Stewart,* 114 id. 231); and a mere preponderance of evidence, which at the same time is vague or ambiguous, is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding *(Lalone v. U. S.,* 164 U. S. 255, 257, *ad finem*).

There must be actual proof of the fraud charged; each case must be determined by its own facts and circumstances; and the net result of the decisions in this

class of cases is to resolve the whole problem of fraud or no fraud into a question of ordinary fairness.

Good faith is always presumed. This is so by statute in California (Code Civil Procedure, Section 1963, Subdivisions 1, 19, 20, 33, 39); and the proposition that fraud is never presumed is axiomatic in the law. It is laid down by the Supreme Court that "fraud cannot be presumed or inferred without proof in a Court of Equity, any more than in a Court of Law; and in both the rule is that he who makes the charge must prove it" (*Hager v. Thompson,* 66 U. S. (1 Black.) 80, 91); and "the fact that fraudulent relations are possible is hardly a sufficient reason for denouncing transactions which are not fraudulent" (*Etheridge v. Sperry,* 139 U. S. 266, 278); and the general attitude of the courts in cases of this type is well summarized by Mr. Justice Story in *Prevost v. Gratz,* 19 U. S. (6 Wheat.) 481, 498, where the learned Justice, after pointing out that "it would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be encumbered; the most that can fairly be expected in such cases, if the parties are living, from the frailty of memory and human infirmity, is that the material facts can be given with certainty to a common intent", goes on to say that "fraud, or breach of trust, ought not lightly to be imputed to the living; for the legal presumption is the other way." Anything, indeed, is "possible" in this life; but transactions must be established to be fraudulent by a

consideration of their actual facts—not by transmuting the possible into the actual by the use of theoretical hypotheses more or less remote and more or less chimerical. No accusation of fraud, indeed, can be entertained which is not based upon "tangible facts". As observed in a recent case:

> "The vital and essential element of complainant's right and cause of action consists in fraudulent and oppressive misconduct of the defendants in making a contract by and under which the product of the manufacturing company was turned over to the Chase and Baker Company at a loss to the manufacturing company and its stockholders, including complainant. Beyond the bare facts that the individual defendants were in control of both corporations, and made such a contract which resulted in loss to the manufacturing company and indirectly to complainant, the bill sets forth no specific acts of misconduct on the part of the defendants. It is true that the bill charges in most general terms that the action of the defendants 'was in pursuance of a contract craftily, corruptly and fraudulently entered into between the two corporations', and that they 'falsely and fraudulently' pretended that the reason why the Chase & Baker Company did not purchase the capacity output of the manufacturing company was because the product was imperfect and defective, and that the failure to make sales and thus to keep the factory running to its full capacity was owing to the inexperience, incompetency and mismanagement of the defendants and their agents and servants, but it does not point out any specific acts or facts which constitute such corrupt and fraudulent misconduct. It nowhere appears that the Chase & Baker Company made an unusual or abnormal profit, or that the maximum output of the factory could have been sold elsewhere with or without a profit, or that the products would have brought more if they had been sold in the general market. Corporations controlled and managed by the same officers and stockholders have a right to deal with each other and courts will not interfere in their internal affairs unless the actions of the majority in

> control are dishonest or fraudulently oppressive to the minority. Losses resulting from ignorant or even foolish mismanagement cannot be recovered. A bill founded upon fraud or misconduct which does not allege with certainty and definiteness *tangible facts* to sustain its general averments of such fraud and misconduct is insufficient, and cannot be sustained."
>
> *Smith v. Chase & Baker Piano Co.,* 197 Fed. 466, 470-471;
>
> *Thomas & Barton Co. v. Thomas,* 165 id. 29.

It is a mistake to suppose that a combination of stockholders is fraudulent; stockholders may legitimately combine their holdings for the purpose of electing officers and directors, and controlling the management of the corporation *(Webber v. Della Mining Co.,* 94 Pac. (Idaho) 441; *Hayden v. Official Hotel Co.,* 42 Fed. 875). And it is equally erroneous to assume that poor management, even though it may result in loss to the corporation, furnishes any ground for equitable interference; and this, because there is an obvious distinction between a difference of opinion as to how an enterprise should be operated, and fraud. Directors are not held to supernatural diligence; they are required to exercise that degree of diligence only which is employed by prudent men in their own affairs. It has never been the law, so far as we are advised, that because a minority stockholder, who in his own fatuous opinion is the anointed of the Lord and thus by divine right monarch of all he surveys, cannot in all things have his own sweet will, he is therefore, like a peevish, petulant child, to refuse to play, and to sulk, and to shriek fraud at all things and persons that do not happen to please or

soothe his rule or ruin temper; and, in this connection, reference may be had to an opinion of the Supreme Court of Texas which, we think, summarizes the views of the courts generally upon this topic:

> "If the acts or things are or may be that which the majority of the company have a right to do, or if they have been done irregularly, negligently, or imprudently, or are within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved, these would not constitute such breach of duty, however unwise or inexpedient such acts might be, as would authorize the interference by the courts at the suit of a stockholder. To allow suits of this character would be to permit every shareholder who might be dissatisfied with the progress of the work or enterprise in which the company was engaged, or the manner in which it might be conducted by the directors, or board authorized to conduct it, to institute his suit, upon the ground that the enterprise or work of the company was not being carried on, or was being delayed, or arrested in a manner not, in his judgment, conducive to the interests of stockholders."
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> *Cates v. Sparkman,* 73 Tex. 619.

It is, of course, thoroughly settled that a mistaken business policy is not fraud, nor is an error of judgment to be considered as fraud; and fraud "cannot be conjectured from the fact (if fact it be) that the defendants are bad men and have been guilty of other independent frauds" *(Fox v. Mining Co.,* 5 Cal. Unrep. Cas. 995). In a word, fraud is never presumed; it cannot be established by vague, uncertain, doubtful or ambiguous evidence; it can be established only by such evidence as brings home to the breast of the court, in a most clear and convincing manner, the actual perpetration of specific wrong-doing; and wherever the

evidence is open to more than one construction, that construction will be adopted which makes against a finding of fraud, and in favor of a finding of innocence *(Ryder v. Bamberger,* 172 Cal. 791).

And here a brief word may be added concerning the accusation of conspiracy of which so much is attempted to be made in complainant's pleadings. In cases of this class, a fraudulent agreement is the basis of the accusation of conspiracy; there must be a real agreement as distinguished from individual purposes which have never coalesced into concert; and that agreement must be one that is fraudulent when appraised by the standards of equity. There is, we submit, no such legal concept as conspiracy in the abstract; persons may conspire —to use the term loosely—as much as they please, and yet remain immune from criticism, so long as no overt act is done; and it is precisely because the concept of conspiracy is essentially relative and concrete, that the mere conspiring is of no significance until it develops into concrete overt acts. Since the mere conspiring, unattended by overt acts, is but a mental operation or condition, it follows, we think, that a voluntary combination of men has in it no element of evil which infects with a fraudulent character acts which are not in themselves fraudulent; on the contrary, voluntary combination is fraudulent or not just as the conduct which it involves is fraudulent or not. In other words, men may combine without being guilty of conspiracy; a combination becomes fraudulent only when the conduct which it involves is fraudulent; it is the fraudulent nature of the concerted purpose as translated into action, which

imparts to the combination its fraudulent character; this is why Judge Sanborn tells us (*Fain v. U. S.*, 209 Fed. 525, 531) that it is not unlawful to conspire to do that which the law does not prohibit; and this is why an accusation of conspiracy adds nothing to an alleged cause of action of the class involved here. If the acts and conduct alleged are not, in and of themselves, fraudulent, a combination to do them is not harmful; but if those acts or that conduct should be intrinsically fraudulent, the combination is immaterial because unnecessary. How, indeed, is it possible that a combination to do unprohibited, non-fraudulent acts, can be a fraudulent conspiracy? But, if this view be correct, we submit that, assuming for argumentative purpose the existence of a combination among these appellants, if their acts and conduct as disclosed in this record cannot fairly be said to have been acts and conduct infected with fraud, it must then be plain that the alleged conspiracy has not been established.

The real inquiry, upon this phase of the case, must be, we submit, whether this record establishes that there was a real agreement and concert among these appellants to defraud this company and its minority stockholders, whether that agreement and concert were inspired by that fraudulent purpose, and whether these elements were followed up by overt acts designed to further the object of the antecedent conspiracy. But that inquiry is nowhere answered by proof. It cannot be said with any justice that these defendants were conspirators because they were acquainted. Nor, assuming knowledge upon their part of fraudulent conduct

(if any), can that furnish any basis whatever for affecting them with complicity—even affirmative concealment would not make them conspirators *(Bird v. U. S.,* 187 U. S. 118; *People v. Woodward,* 45 Cal. 293). Nor can resort be had to an alleged overt act to prove the asserted conspiracy; you cannot argue back from the overt act to the prior conspiracy from which it sprang; the conspiracy itself is the foundation for, and source of, the subsequent, independent, overt acts, and you cannot infer from my participation in the overt act that I was a conspirator—you must prove me to have been a conspirator by independent evidence. In no case, indeed, can acts occurring after the conspiracy is formed be referred to for the purpose of proving the existence of the conspiracy, but the connection of the defendants with the conspiracy must be established by independant evidence. And even evidence of subsequent conditions consistent with the existence of a conspiracy—if any such evidence there were—would not establish the conspiracy.

THE OSBORN STOCK EPISODE.

The acquisition by William S. Noyes of the Osborn stock was a transaction not only intrinsically free from fraud, but also one with which neither the Presidio Mining Company nor these complainants had any legal concern or interest; Osborn was free to do as he pleased with his own, and if he or any other stockholder should desire to make a gift of his stock, there neither was nor is any provision of law to invalidate the act, and it would be entirely valid.

We have already seen that Mr. Osborn was an old and intimate friend of the Boyds and the Willises, who were,

in 1907, the principal stockholders in the company. We have further seen that Osborn's connection with the company as an officer thereof had extended over very many years; that his functions were those of a secretary and treasurer; and that, except in a clerical way, he had no direct or immediate relation to the actual mining operations. It is alleged by the complainant that, during all these years, Mr. Osborn never visited the mine; and indeed the contention is that Mr. William S. Noyes was the only person who did so. Osborn remained as secretary of the company until September 23, 1915, but his duties as to the funds of the company were abruptly terminated in January, 1913, when the shortage was discovered, and when the present administration took office. During all these times, Mr. William S. Noyes busied himself with the mining operations, but not with the duties of the secretary; it nowhere appears that Mr. Noyes kept any of the books or records, or made any entries therein, or that any entries were made therein at his suggestion or under his direction. We have also seen the beginning, the end and the extent of Mr. Osborn's peculations from the company. As already pointed out, those peculations began not long after the fire in San Francisco on April 18, 1906, and it is not an unreasonable inference, from various features and items of evidence in this record, that these peculations were in progress during the fall and winter of 1907. During that winter, the general situation of the company, including the conditions at the mine, could not well have been worse. The grade of ore available had much depreciated; the price of silver was low; these

two features destroyed the utility of the pan amalgamation method; the conditions were so bad that the directors actually ordered the mines shut down and the employees discharged; and the general outlook was gloomy and depressing. At this time, again judging from various items of evidence in the record, Boyd was evidently no longer a young man; and the unfortunate condition of the company reacted upon him. At the very same meeting of December 13, 1907, when the mine was ordered shut down and the employees discharged, Boyd resigned as president and as director of the company. It does not appear that at this time the stock of the company was anywhere listed, or that it then had any market value; and indeed, the conditions then existing were such that it would be remarkable if the stock then had any market value.

Under these disheartening conditions, Boyd resigned the presidency and directorship of this company on the same day when the mine was ordered shut down and the employees discharged; but this was not all that Boyd did upon that day. On that day, December 13, 1907, the Boyds transferred to Osborn the stock which theretofore had stood in their names, aggregating some 57,213½ shares; and so far as this record instructs us upon the subject, there is no proof that Osborn ever paid to Boyd a single dollar for this stock, or delivered him any consideration whatever therefor. It would seem that one, at least, of the motives that actuated Boyd in making this transfer to Osborn was self protection from liability as a stockholder in a company which, under the existing conditions, Boyd had every reason to

believe was just about to founder. There is indeed no inherent improbability in this hypothesis; transfers of stock holdings for the purpose of avoiding liability, as where large stockholders, "keep off the books", or "get off the books", are common (as for example in *Crescent City Bank v. Case,* 99 U. S. 631; *Anderson v. Philadelphia Warehouse Co.,* 111 id. 483; *Peters v. Baine,* 133 id. 692; *McDonald v. Dewey,* 202 id. 510); and this motive was not one which was peculiar to Mr. Boyd. The same motive actuated the conduct of other shareholders, including Mrs. Willis who put her stock into the name of Miss Doherty, and Mr. Mills who put his stock into the names of the complainant and others. These transactions all took place within the same depressing period of time; there was a certain simultaneity of transfer to Osborn and transfer to these complainants, not of date, but of period; to the operation of this motive, these complainants owe their stock; and they are direct inheritors from the fears of their predecessor.

And there was good reason why Mr. Boyd should desire Mr. Noyes to share in the stock transferred to Osborn; Boyd and Noyes had been associated in this venture practically from its beginning; Boyd understood and no doubt appreciated the interest which for many years Noyes had shown in the operation of the mine; Boyd realized that Noyes' activities were of a much more practical character than the clerical duties of Osborn; and Boyd doubtless felt that while he was bound to Osborn by business, social and friendly ties, yet, upon the other hand, the relation of Noyes to this

enterprise was such that the opportunity at least should be given him to share with Osborn in the transferred stock. It was, then, on December 13, 1907, that Boyd resigned from the company and transferred his stock to Osborn, accompanied by the statement that Mr. Noyes should have one-half of the stock, if he desired to take it; and at this time, Noyes was not in San Francisco, but was at the mine in Texas. Nowhere in this record from the beginning to the end can there be found a particle of evidence to show that prior to December 13, 1907, either Osborn or Noyes had any premonition of Boyd's purpose to retire from the company and transfer this stock; nor is there in the record from beginning to end the slightest particle of evidence to show that Noyes had any advance information that Boyd would perform these acts on December 13, 1907; and these facts are of extreme importance in dealing with the claim of the complainant that Noyes extorted from Osborn that portion of the Boyd stock which Osborn transferred to him. Boyd transferred this stock to Osborn under the conditions mentioned, and without any knowledge thereof at the time on the part of Noyes, on December 13, 1907, Noyes then being in Texas; but, upon the following day, December 14, 1907, Osborn wrote to Noyes relative to this very transaction of the transfer of this stock to himself from Boyd. This letter of December 14, 1907, does not appear in the statement of evidence, but some 11 days thereafter, on December 25, Osborn wrote a second letter to Mr. Noyes upon the same subject matter, which letter does appear in the statement of evidence; and so far as the disclos-

ures of this record advise us, these two letters contain the first information that Mr. Noyes had of the act of Boyd in transferring his stock to Osborn and of Osborn's own view "that if you (Noyes) wanted half of said shares which I own, you can have them". And very naturally, these facts prompt the inquiry whether this anxiety of Osborn in California on this subject, indicated in two letters originating from Osborn within two weeks to Noyes in Texas, suggests any extortion whatever of this stock from Osborn by Noyes? And we submit that nothing in this record can justify the distortion of these facts into any act of extortion on the part of Mr. Noyes. In writing these two letters from California to Texas, Osborn was seeking to comply with the desires of Boyd; will it next be pretended that Noyes dominated Boyd into the expression of these desires? And as between Osborn and Noyes, who originated the suggestion as to Noyes taking half of the stock? By what sort of telepathy did Noyes in Texas dominate Osborn in California to write these two letters? If Osborn, at the suggestion of Boyd, opened this matter to Noyes, the former being in California and the latter in Texas, upon what fact, upon what delusion as to what fact, can the claim of extortion be predicated? And if Boyd had sent Osborn to Noyes to ask him to take over the stock, and if Osborn had done so either physically or by letter, would not evidence of those facts be admissible in favor of Noyes, instead of against him *(Perkins Administrator v. Embry,* 72 S. W. (Ky.) 788)?

We submit that the letter from Osborn to Noyes which is contained in the statement of evidence should be analyzed in the light of all the antecedent and surrounding circumstances, and in the light of the circumstance that its language was the language of a layman, and that this should be done with the object of getting at what was really in Osborn's mind, what he meant and what he tried to express. We further suggest that Osborn's use of the term "purchaser" in this letter should be especially noted; and that while any other person than Noyes would actually and really have been a "purchaser", yet there is no intimation that Noyes himself was a purchaser, or that Osborn had any purchaser in view. In other words, it should be observed, we think, how loosely this clerk, Osborn, uses language —how loosely he uses language to which a strict technical meaning is now sought to be given, that never entered his mind; for example, he speaks of stock that the Boyds "sold to me", although we all know as well as any fact can be known that the Boyds did not "sell" the stock to him, but made a gift of it to him with the understanding that Noyes was to have one-half,—there was no "sale" by the Boyds to Osborn.

The record shows without contradiction that upon Mr. Noyes' return from Texas after his visit there in December, 1907, he notified Mr. Osborn that he would take the one-half of the stock which Boyd had intended he should have; but, as is not infrequently done, the formal transfer was not carried out, and the stock was, until December, 1912, still standing in the name of Osborn (see an example of this in *Anderson v. Phila-*

delphia Warehouse Co., 111 U. S. 479, where the stock stood in the name of another for a period of from five to seven years). The interval between 1907 and 1912, was, as we have already pointed out, not a particularly prosperous one for the company; on the contrary, it was marked by those fluctuations and vicissitudes which are so characteristic of mining property, and which led up to the abandonment of the pan amalgamation method, to the overdraft of January, 1913, and to the vital necessity of installing the cyanide plant if the company was to be saved from utter ruin. During this time, the stock stood in the name of Mr. Osborn, who recognized Mr. Noyes' ownership, and never did any act or thing whatever which could be construed, directly or indirectly, as any impeachment of that ownership. Finally, when the condition of the company became such that desperate remedies were needed, and large responsibilities had to be assumed in order to install the needed cyanide plant, Mr. Noyes informed Mr. Osborn that if any responsibility were to arise he was prepared to assume his share of it, and requested the transfer of his share of the Boyd stock to be made upon the books of the company, which was accordingly immediately done.

This record is barren of any proof that Mr. Noyes then knew of the Osborn shortage; nor is there any proof that this transfer from Osborn to Noyes was made in consideration of the money loaned to Osborn to make good his shortage—that loan was concreted in the secured promissory note made by Osborn to Noyes. On the contrary, the proof shows Noyes to have been

the equitable owner of one-half of the Boyd stock since 1907, and that Noyes did not acquire that stock because of the loan to Osborn. Mr. Noyes did not become a director of this corporation until January 31, 1913; and from 1906 to 1913 his attention was given to the details of mining operations rather than to the details of bookkeeping that were not in his charge, but in Osborn's; and during this period Mr. Noyes was away at the mine much of the time. In addition to the improbability that under these circumstances Mr. Noyes would have known of Osborn's secret peculations, there is a further improbability that Mr. Osborn would publicly flaunt those peculations while engaged in them; on the contrary, he would have every motive to keep them secret; and the fear of the exposure of a criminal record is a very powerful and convincing motive, particularly to a man in Osborn's business, social and family position. Moreover, no claim or rational pretense of a claim has been or can be made that Mr. Noyes participated with Osborn in these peculations so as himself to have a motive to keep them secret; and Mr. Noyes' letter to Mrs. Willis, written from El Paso, Texas, as early as January 23, 1913, speaks volumes as to his antecedent ignorance of these peculations. In regard to this transaction Mr. William S. Noyes testified as follows:

> "Osborn had been holding that stock (28,607 shares) in trust for me since December, 1907. I had not had it transferred because the company was in such a precarious position that I was staying, as all the rest of the big stockholders did, off of the books. When we decided to make an attempt to do this work (installing the cyanide plant) I told Osborn to transfer it to me—that if there

was any responsibility to be assumed, I was going to assume my share of it.''

Indeed, the direct testimony of Mr. Noyes was that he first learned of the Osborn shortage while he was at Shafter, Texas, on the 19th or 20th of January, 1913; and all of the circumstances in the case go to show that he was ignorant of that shortage during all of 1912. His testimony does not stand alone but is corroborated by that of his brother, Mr. B. S. Noyes, whose testimony contains full details of the circumstances under which he discovered the Osborn shortage in January, 1913, and of his notification to William S. Noyes by telegram at that time. And in addition to this, Mr. William S. Noyes is corroborated by the letter to Mrs. Willis above referred to dated January 23, 1913, and written from El Paso *ante litem motam,* wherein we find a fair exhibition of the state of his mind with reference to the Presidio Mining Company and its affairs. This letter plainly fixes the date when Mr. Noyes first learned of the Osborn shortage; and no explanation has been made or attempted by this complainant of the manner in which Mr. Noyes, in December, 1912, extorted, or could have extorted, stock from Osborn by means of facts with which he did not become acquainted until some six weeks later; and it may be added that not only does this letter from Mr. Noyes to Mrs. Willis exhibit the complete futility of the claim that Mr. Noyes utilized the Osborn shortage to extort the Osborn stock, but it demonstrates the anxious care and regard of Mr. Noyes for the welfare of the Presidio Mining Company and its stockholders, and the sacrifices

which he had made and was willing to make for their benefit. There is no testimony in contradiction of our view of this matter, that is worth a moment's consideration. The complainant sought to show that Mr. Noyes knew of the Osborn shortage, not in the month of December, 1912, not on the 12th of December, 1912, but in the early part of January, 1913, by the witness Kniffin, who was employed to do certain work on the new mill. Kniffin testified that he returned to Shafter "about January 3rd, and did some other detail work on the design of the mill" (949). Mr. Kniffin does not explain how much time he devoted "to this other detail work on the design of the mill"; and whether that detail work occupied a week or ten days or a fortnight is left wholly unexplained. Mr. Kniffin then states that he "*was then ready to proceed with the construction* and Mr. Gleim told me that money they thought they had had been taken from the treasury and they did not have it" (949); but when Mr. Gleim made this statement, Mr. Kniffin wholly fails to inform us, and for anything that Mr. Kniffin states to the contrary, Mr. Gleim may have made this statement on January 18, 1913. Mr. Kniffin then states that on January 19th, Mr. Gleim gave him orders to start the work, and "I started the work on the 20th" (949). But, on cross-examination, it developed that the work which Mr. Kniffin is here speaking of did not involve any of the structural parts of the mill; and that what he had in mind when he spoke of starting the work on the 20th was the commencement of the building of certain retaining walls; he tells us that some Mexican masons built those retaining walls, and

"I did not begin on any of the 'structural parts at that time' " (957); when he actually commenced his work upon the mill itself he leaves in the same doubt and uncertainty which pervades other portions of his testimony. The uncertainty of his memory may further be illustrated by the circumstance that while in his direct examination he tells us that on January 19th, Mr. Gleim gave him orders to start the work and that he started the work on the 20th, still in his cross-examination, he infuses an additional element of uncertainty into his story by telling us "I was told to start operations *about* the 19th or 20th of January,"—an uncertainty which he repeats a few lines further on in the course of his testitimony (957). Nothing, indeed, could be more characteristic of the uncertainty and unreliability of Mr. Kniffin's memory and testimony, than the extent to which his testimony is punctuated by expressions typical of uncertainty and especially of uncertainty as to dates. He tells us that he was employed by the Presidio Mining Company from "on or about" December 23, 1912, until "on or about" May 12, 1914; he says that he first went to Shafter in the year 1910, "I think it was"; and that he went there again, "on or about" December 23, 1912, in connection with the installation of the cyanide plant. He says that when he got to Shafter he commenced designing additions and making estimates of costs, and that this took him "about a week"; and he then says that he went to El Paso "either on the 30th or 31st of December" (948). He is equally uncertain as to the source from which he received information of the Osborn shortage, saying, "I was told by either Mr.

E. M. Gleim or Mr. William D. Burcham'' (949). He was then asked to fix the time when he was informed of this shortage, ''as near as you possibly can''; and he replied that ''it was the early part of January'' (949),—which would be January, 1913. He then goes on to say that he returned to Shafter, apparently from El Paso, ''about January 3rd''; and he follows this up by stating for the first time a definite date, saying ''on the 19th day of January, he, Mr. Gleim, gave me orders to start the work—, ''I started the work on the 20th'' (949), but, as we shall see hereafter, even as to this date his memory was unreliable. The direct examination then dealt with other matters; and when, on cross-examination, the dates pertinent to the present inquiry were recurred to, Mr. Kniffin again exhibited the same vagueness and uncertainty which characterized his direct examination. It will be remembered that on his direct examination, the only date which he professed to state with any degree of certainty was January 19th, when he received orders to start the work, and January 20th when he actually started the work; but on cross-examination, we find his statements in this regard again becoming indefinite, and we find him saying that ''I was told to start operations *'about'* the 19th *or* 20th of January'', and a few lines further along, on the same page (957), and dealing with the same subject matter, we find him vaguely referring to ''on or about the 19th or 20th of January''. And finally nothing, we think, would be more typical of the uncertainty and unreliability of his memory and testimony than the following passage of his cross-examination:

> "He (now Mr. Gleim, and not either Mr. E. M. Gleim or Mr. William D. Burcham, as on page 949) had previously told me *sometime toward the first of the month* that there would have to be *suspension of some kind* because they did not have any money. I arrived there *about the third of the month*, and it was *some time after the third* that he told me; when he told me I had been there *some little time; I don't know exactly how long—I could not say; it may have been ten days; I think it would be about ten days. I should say* he told me that *on or about the 13th of January*" (page 957-8).

We have here, in other words, testimony which deprives this complainant, we submit, of all claim to contradict Mr. Noyes upon the subject matter of his first discovery of the Osborn shortage. We observe that Mr. Kniffin is wholly uncertain even as to the time when he arrived, that he is wholly uncertain as to when Mr. Gleim (if it was Mr. Gleim) mentioned the shortage to him, and that Mr. Kniffin is wholly unable to state how long after this uncertain arrival it was when Mr. Gleim (if it was Mr. Gleim) made the statement to him. While it does appear that the general testimony of Mr. Noyes exhibits him as the possessor of an unusually good memory as to the details of transactions, while it is only rational to believe that the keen interest of Mr. Noyes in the installation of this cyanide plant would quicken his memory as to a discovery so agitating as that of the Osborn shortage, and while it appears that Mr. Noyes had contemporaneous transactions and documents, such as the letter to Mrs. Willis of January 23, 1913, banking and other transactions at Marfa, etc., by which to check his recollection, yet it nowhere appears that Kniffin had anything whatever upon which to base

even his uncertainties except an unassisted memory some three years old; and we feel that, in an assessment of the cogency, or lack of cogency, of his testimony, one should bear in mind that his general uncertainty as to dates, in a situation where dates are of importance, is nowhere relieved by any memorandum, diary, letter, or other similar assistance; and in this connection, it may not be improper to remark that the local Supreme Court has pointed out that

> "evidence of a conversation resting only in the memory of a single witness is ordinarily the most unsatisfactory of all evidence. Conversations are so easily misunderstood, particularly under circumstances of excitement, and the human memory is so treacherous, that testimony of this character is held by all courts to be the weakest of all evidence".
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> *Thompson v. Toland,* 48 Cal. 99, 115.

The situation here presented is one in which dates are of importance, and in which testimony attempting to fix dates should have a reasonable degree of precision if any weight is justly to be attached to it; but the only attempt made by Kniffin to fix any date is the vague, cloudy and insufficient reference contained in the word "about", or the phrase "on or about", an uncertainty and indefiniteness resting upon the unassisted memory of a single witness, and unchecked by any contemporaneous memorandum or other document. There is a general concensus of judicial opinion to the effect that such an indefinite and uncertain term as "about", or the equally indefinite and uncertain phrase "on or about", is quite inconsistent with any precision of date; and the books seem to agree that such terms are

indefinite, uncertain and vague. Indeed, to paraphrase the language of Judge Deady, the statement that a fact occurred "on or about" a certain day is not a statement that it occurred on any distinct day or time; the actual day or time may be either before or after the one stated with an "on or about"; and in short, such a statement amounts to nothing so far as time is concerned (*Conroy v. O. C. Co.,* 23 Fed. 71, 73; and see similar conclusions reached in *U. S. v. Crittenden,* 25 Fed. Cas. (14,890-a) 694, and *U. S. v. Winslow*, 28 id. (16,742, 737, 739). And see also, as supporting the views just advanced, the following authorities:

Bennett v. Lingham, 31 Fed. 85;
The Alert, 61 Fed. 504, affirmed *sub nomine;*
Sanders v. Munson, 74 id. 651;
The Rygja, 149 id. 897; on appeal, 161 id. 106;
Santa Monica Lumber Co. v Hege, 48 Pac (Cal.) 69, 71;
Cohn v. Wright, 89 Cal. 86, 88;
Hawes v. Lawrence, 4 N. Y. 345, 347;
Kerr v. Blair, 105 S. W. (Tex.) 548, 551;
Blair v. Riddle, 57 So. (Ala.) 382, 383.

And in addition to all of this, it should be borne in mind that Kniffin makes no pretense that Mr. Noyes knew of this shortage in December, 1912, or prior to December 12, 1912, or on December 12, 1912, or at any other time prior to January 13, 1913; and we shall be much interested to be advised as to how Mr. Noyes could have, on or before December 12, 1912, either extorted stock from Osborn, or laid any plan whatever to wreck this company or secure from it any advantage

peculiar to himself, by reason of facts or circumstances which he never learned until a month later, on January 13, 1913, while in the foreign State of Texas.

And let it further be observed that Mr. Kniffin undertakes here to reproduce declarations by Gleim or Burcham, made out of the presence and hearing of Mr. Noyes, the person sought to be charged thereby. Not only is there not a particle of proof to show where Gleim or Burcham got this information, not only is there nothing to establish that such information was derived from Mr. Noyes or from anyone authorized by him to give it, but what authority was Gleim, or Burcham, proved to have had which would authorize him to bind either the company or Mr. William S. Noyes by any statements as to the condition of the company's treasury? Such declarations were not shown to have been within the scope of the employment of either of them; and for this reason as well as because of the absence of the person against whom the statement is sought to be used, the asserted declaration to Kniffin was the merest hearsay *(California Code of Civil Procedure,* Sec. 1870, Subdiv. 5; *Meachem Agency,* Sec. 1774; *Vicksburg Ry. v. O'Brien,* 119 U. S. 99; *Kenah v. The John Markee,* 3 Fed. 45; *Marande v. T. P. Ry,* 124 id. 42, 45; *Walker Mfg. Co. v. Knox,* 136 id. 335; *Woolsey v. Haynes,* 165 id. 391; *Burch v. Hale,* 99 Cal. 300; *Smith v. Liverpool Ins. Co.,* 107 id. 432, 437; *Lissak v. Crocker Estate Co.,* 119 id. 442; *Boone v. Oakland Transit Co.,* 139 id. 492; *Luman v. Golden Co.,* 140 id. 709; *Union Const. Co. v. W. U. Tel. Co.,* 163 id. 298; *Waldeck & Co. v. P. C. S. S. Co.,*

2 Cal. App. 167, 169; *Bender-Martin Co. v. Apollo Co.,* 101 N. Y. S. 75; *City Bank v. Bateman,* 7 Harr. & J. (Md.) 104; *Parker v. Green,* 8 Metcalf (Mass.) 137.) The law is, indeed, familiar that an agent's declarations are admissible only so far as the agent has authority; the declarations must be made in the line of the agent's duty and within the scope of his authority; they must be made during the continuance of the agency, with regard to a transaction then pending; and they must not only be within the agent's authority but part of the *res gestae,* and must accompany an act which the agent is authorized to do; and even where such declarations are admissible, they must be declarations of fact, and not mere opinions of an asserted agent. In other words, even in a case where the declaration is made by a person who is really the agent of the company or person against whom the declaration is offered, that declaration does not become competent simply because of the relation of agency; the offered declaration must be a statement of *fact* made in furtherance and within the scope of the agency, and contemporaneously with the occurrence of the fact; but a statement of *opinion* expressive merely of the agent's personal conclusion concerning such a matter, for example, as the condition of this company's treasury—itself then a past condition—is not admissible at all *(Merchants Bank v. Bank of Columbia,* 5 Wheaton 336; *Clicquot's Champagne,* 3 Wall. 114, 140; *Xenia Bank v. Stewart,* 114 U. S. 224; *Goetz v. Bank,* 119 U. S. 551; *Packet Co. v. Clough,* 87 U. S. (21 Wall.) 528; *Amer. L. & I Co. v. Mahon,* 88 id. (21 Wall.) 152, 157; *Union Co. v. Robertson,* 79 Fed. 420; *R. P. Ry.*

v. Kempton, 138 Fed. 992; *Geohrig v. Stryker,* 174 Fed. 897; *Plymouth County Bank v. Gillman,* 44 A. S. R. 782; *Boone v. Oakland Transit Co.* 139 Cal. 490, 492-3). And we submit that, even if there were no other objections to the inherent insufficiency of the testimony of Kniffin, inadmissible hearsay of this character cannot properly be appealed to to sustain any finding adverse to Mr. Noyes *(Board of Commissions v. Keene Savings Bank,* 108 Fed. 505, 510; *People v. Warren,* 134 Cal. 202; *Englebretson v. Industrial Accident Comm.,* 170 Cal. 793; *Employers Assurance Corporation v. Industrial Accident Comm.,* 170 Cal. 800).

In other words, no proof was made which could justly be permitted to throw doubt upon the direct, positive, and affirmative testimony of Mr. Noyes, corroborated as it was; no impeachment can be supplied by wild imaginings, conjured up by an excitable complainant, but unresponsive to the facts in the record; and theoretical hypotheses, unsupported by the actual evidence, cannot be permitted justly to outweigh this direct testimony to the fact *(Choctaw Ry. v. McDade,* 191 U. S. 64; *Wabash Co. v. Black,* 126 Fed. 721; *Boucher v. Larochelle,* 15 L. R. A. (N. S.) 416; *Wolfarth v. Sternberg,* 56 Atl. (N. J. 173); *Angel v. Jellico, etc. Co.,* 74 S. W. (Ky.) 714). And since the accusation of fraud has been made, it is relevant to remember that there is no antecedent presumption of fraud; and that each material independent fact in the series of facts relied on to establish the asserted fraud, must itself be established with the same degree of certainty as the main fact which these individual circumstances are relied on to establish. The degree of cer-

tainty necessary to establish fraud, or the constitutive circumstances upon which it is sought to predicate fraud, is not to be satisfied by surmises, speculations or conjectures; on the contrary, the law protects those accused of fraud by indulging every presumption against the accuser, and by insisting that, unless the accusation shall be established by evidence so clear, unequivocal and convincing as to remove that strong presumption of innocence and fair dealing which has so firm a foundation in the law, the complainant must fail *(California Code of Civil Procedure,* Section 1963, Subdivs. 1, 15, 19, 20, 28, 33; *Slaughter v. Gerson,* 80 U. S. (13 Wall.) 379; *Andrus v. St. Louis Co.,* 130 id. 643; *Farrar v. Churchill,* 135 id. 609; *Fox v. Hale and Norcross Mining Co.,* 5 Cal. Unrep. Cas. 980; *Ryder v. Baumberger,* 172 Cal. 791). It may be added that the doing of a lawful act by all the powers enabling one to do it, is not fraud, and is subject to no legal censure *(U. S. v. Isham,* 84 U. S. (17 Wall.) 496; *Jaster v. Currie,* 198 id. 144, 148). "If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached" *(Doyle v. Continental Ins. Co.,* 94 U. S. 535); and, indeed, the note of actuality everywhere pervades the law of fraud. No person can be supposed, believed or presumed into fraud; the law does not fasten the stigma of fraud upon people, upon the potential, possible or theoretical; and a prosecution for fraud is no place for uncertainties, doubts or debilitated constructions, whether of law or fact—the possible is not to be transmuted into the actual *(Etheridge v. Sperry,* 139 U. S. 266, 278). It is, indeed,

among the commonplaces of the law that evidence which leaves it uncertain whether the fraud charged was committed, or whether the accused person committed it, is insufficient for any judicial purpose; and that even where the facts of a case are consistent with varying theories, a judicial tribunal will adopt that construction which makes for innocence—"where the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof" *(U. S. Fidelity Co. v. Des Moines Nat. Bank,* 145 Fed. 273; *Ryder v. Baumberger,* 172 Cal. 791).

Kniffin's testimony is, therefore, entirely consistent with the testimony of Mr. Noyes that he first learned of the Osborn shortage while at Shafter, Texas, on January 19th or 20th, 1913; certainly, from no judicial point of view can the testimony of Mr. Kniffin be treated as a contradiction of the testimony of Mr. Noyes, because Mr. Kniffin nowhere testifies, nor does he profess to testify that Mr. Noyes knew of this shortage either during the month of December, 1912, or upon any date in the month of December, 1912, or prior at least to January 13, 1913. Even if, therefore, without substantial warrant from the record before us, we were to go to the extreme length of rejecting the testimony that Mr. Noyes did not know of this shortage at the time of the transfer of the Osborn stock, still such rejection could not stand as proof of the contrary proposition, viz.: that Noyes did then know of this shortage; because a disbelief in a fact to which a witness has testified does not warrant an inference of the existence of the contrary fact to which no one has

testified *(Bank Note Co. v. McKeige,* 45 N. Y. Supp. 197).

We submit that there was nothing in this transaction between Osborn and Noyes which could be construed as a fraud upon Osborn, or the Presidio Mining Company, or these complainants.

> "Stockholders become such in several ways, either by original subscription, or by assignment of prior holders, or by direct purchase from the company."
>
> *Webster v. Upton,* 91 U. S. 65.

> "The stockholders do not represent the corporation, but for some purposes the corporation represents them."
>
> *Ex parte Cutting,* 94 U. S. 14.

> "The term 'corporation' does not include stockholders and a statute imposing a liability upon the corporation does not thereby impose the same upon the stockholders."
>
> *Park Bank v. Remsen,* 158 U. S. 337, 346.

The relation of a stockholder to his corporation, its officers and his fellow stockholders is one of contract in which the pertinent statutes and the settled law are embodied *(Shattuck v. Desmond Co.,* 154 Cal. 778; *Business Men's Assn. v. Williams,* 119 S. W. (Mo.) 439). From these views, one would infer the law to be that there is no privity between shareholders, and such in truth is the law. Shareholders are not in privity with each other; they do not bear any trust relations towards each other; but they may deal with each other at arm's length just as they may deal with the corporation *(10 Cyc.* 374-5; *Gillett v. Bowman,* 23 Fed. 625; *Miller v. Dredging Co.,* 137 N. W. (Iowa) 507). Stockholders are not trustees for each other—each represents his own

interest (*Windmuller v. Standard Co.*, 114 Fed. 491; 115 id. 748); no fiduciary relation existed between Osborn and Noyes *quoad* the transfer by Osborn to Noyes of this stock (*Middleton v. Mining Co.*, 146 Cal. 219; *O'Neile v Ternes*, 73 Pac. (Wash.) 692; *Krumbharr v. Griffiths*, 25 Atl. (Pa.) 64); and no duty to speak would arise upon Noyes' part even from the fact (here hypothetically assumed) that he knew that Osborn, in this stock transfer, would take action prejudicial to himself, if the real facts (if there were any and whatever they might be) were known to Noyes but not disclosed by him (*Wiser v. Lawlor*, 189 U. S. 272; *Central Savings Bank v. Smith*, 95 Pac. (Colo.) 307; *Roosevelt v. Hamblen*, 85 N. E. (Mass.) 101).

We submit that it does not follow by any means that Mr. Noyes had knowledge of the Osborn defalcation, because at the time of the transfer of the stock by Osborn to Noyes, Osborn was then a defaulter.

The reason for this, we think, is obvious; Noyes could very well have been without any knowledge of this shortage; his activity was concerned with the practical operation of the mine; much of his time was spent in Texas, at the mine; he did not handle the funds of the enterprise; he was not in charge of its books or records; and up to the time of this transfer no occasion or emergency had arisen to suggest to him even a suspicion of a shortage; there is no evidence in this record that, at the time of this stock transfer, Osborn's default was known to Noyes or to any other person; and it is simple common sense that Osborn himself was not publicly confessing that unpleasant fact.

Let us, however, assume purely for argumentative purposes, that Noyes did know of this shortage in or prior to December, 1912; even then, it would still not follow, that by reason of his knowledge of Osborn's default he extorted from Osborn one-half of the Boyd stock. One of the most convincing answers to this unproved claim of extortion is to be found in Osborn's own letters to Noyes, one of them written almost immediately after the transfer from Boyd, and the other eleven days later, and both of them mailed by Osborn in California to Noyes in Texas—private and personal letters, plainly originating voluntarily from Osborn, written long *ante litem motam*, without a hint of extortion or pressure of any sort, and affirmatively pressing a transfer without a syllable of protest or remonstrance.

Extortion is not, indeed, a matter of guess or conjecture; he who charges it must make his accusation good by competent proof, plainly visible in the record; there is no antecedent presumption that extortion or any other crime has been committed *(U. S. v. Amedy,* 24 U. S. (11 Wheat.) 392); and where a party's theory proceeds upon a claim of this kind, that claim must be proved by specific and tangible evidence, not guessed at or wildly imagined.

And even if, against the surrounding facts, we assume that Noyes actually knew, during or before December, 1912, of that shortage, which was consciously hidden in Osborn's errant mind, and even if we further assume that Noyes made use of that knowledge to extort that stock from Osborn, the question would still remain, what all this had to do with Section 5? None of this

would show that Noyes acquired enough stock from Osborn to enable him to control the company; none of this would show that any of the stock received from Osborn was diverted to the purchase of Section 5; none of this would establish that Noyes' extortion of the Osborn stock, or his purchase of Section 5, was a fraud upon this company. Upon the assumption that Noyes wronged Osborn, an individual, by extorting his stock from him, still none of this would establish that he thereby wronged the corporation; Osborn, the individual, would have his legal remedy against Noyes for the latter's delict; but where does this record exhibit, not superheated imaginings, but tangible evidence of any connecting link between this asserted extortion and the commission of any fraud upon this company by the purchase of Section 5?

It should, we submit, be borne in mind that the law of a State making shares of corporate stock personal property, should be enforced by a Circuit Court of the United States sitting in that State, as part of the law of the State in respect of corporations created by it (*Jellenik v. Huron Copper Mining Company,* 177 U. S. 1); and that shares of stock are personal property, is recognized, not only generally but also in California (*Mattingly v. Roche,* 84 Cal. 207; *People v. Williams,* 60 Cal. 1). But since these shares are personal property, they could be dealt with by their owner as such, without interference by any third party. "The shares are held and may be bought, sold and taxed, like other property" (*Farrington v. Tenn.,* 95 U. S. 687; *McAllister v. Kuhn,* 96 id. 89); the effect of the transfer is to substi-

tute the transferee for the transferor *(Visalia, etc. Ry. v. Hyde,* 110 Cal. 632); the transfer passes the title to the shares to the transferee *(Johnson County v. Thayer,* 94 U. S. 631; *McClung v. Colwell,* 64 S. W. (Tenn.) 890); and the transfer destroys the relation of membership between the corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligation *(Cecil National Bank v. Watsontown Bank,* 105 U. S. 217; *Ricaud v. Willmington, etc. Co.,* 70 Fed. 428). Mr. Osborn's right to transfer this stock was clearly an incident of his ownership, similarly to the right of Mr. Boyd to transfer his stock to Osborn, or the right of Mrs. Willis to transfer a portion of her stock to Mr. B. S. Noyes; and if Mr. Osborn had chosen, regardless of Mr. Boyd's wishes, independently to have made a gift of this stock to Mr. Noyes, such an act would have been entirely legal, and no third party could have questioned it *(4 Thompson, Corporations,* 2nd Ed., Sec. 4100, N. 1; *Foster v. Row,* 120 Mich. 1; *Miller v. Farmers, etc. Co.,* 110 N. W. (Neb.) 995; *Bracken v. Nicol,* 124 Ky. 628; *10 Cyc.* 577, D; *7 Rul. Cas. Law,* Sec. 239, p. 261). And not only was Osborn under no disability of any nature that prevented him from disposing of his stock, but any person capable of contracting and of holding personal property in the State or country under whose laws the corporation is created, might become a shareholder by taking over Osborn's stock. In a word, Mr. Noyes' right to receive a moiety of Osborn's stock was correlative to Mr. Osborn's right to alienate that moiety *(Triscony v. Windshift,* 26 A. S. R. 175; *Smith v. Nash-*

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ville & D. Ry., 18 S. W. (Tenn.) 546; *Pittsburg Library Association v. Mercantile Library Association,* 42 Atl. (Pa.) 142; *McGue v. Rommel,* 148 Cal. 539, 543-4); no claim of fraud upon creditors of Osborn, no provision of statute or charter or by-laws, no agreement, has anywhere been exhibited which could have operated in any way to impede or prevent the free exercise by Mr. Osborn of his right to dispose of his stock; and he was under no obligation to refrain from disposing of his shares, either at the sacrifice of his personal interest, or to enable some other shareholder to make gains or profits *(Farmers, etc. Co. v. Chicago, etc. Ry.,* 163 U. S. 31; *Morgan v. Struthers,* 131 id. 246; *Lamb Co. v. Lamb,* 78 N. W. (Mich.) 646; *Roosevelt v. Hamblen,* 85 N. E. (Mass.) 101; *Victor G. Bloede Co. v. Bloede,* 84 Md. 129).

No other person had any authority to complain about what Osborn, with Boyd's views in his mind, thought proper to do with this stock; and if Osborn felt that, in transferring part of this stock to Noyes, he was doing that which would have afforded satisfaction to Boyd, third parties would have no more right to criticise that act than they would have to animadvert upon Boyd's original transfer to Osborn, or upon Mrs. Willis' transfer to Mr. B. S. Noyes. The validity of this transfer does not depend upon the motives or purposes of either Osborn or Noyes *(Stratton's Independence v. Dines,* 135 Fed. 449; 197 U. S. 623; *McGue v. Rommel,* 148 Cal. 539, 543-4; *Jones v. Green,* 95 A. S. R. 433; *Miller v. Houston Ry.,* 55 Fed. 366; *Mundt v. Comm. Bank,* 99 Pac. (Utah) 454; *Nicholson v. Franklin Brewing Co.,*

137 A. S. R. 764; *In re Discoverers Finance Corporation,* 1 Ch. (1910) 312); the merits of the transaction as between Osborn and Noyes cannot be inquired into by the corporation or by any stockholder *(Adler v. Fenton,* 65 U. S. (24 How.) 407; *Dickerman v. Northern Trust Co.* 176 id. 192; *Thompson Corporations,* Section 4103; 7 R. C. L. 262-3); as observed by Mr. Justice Brewer, "if the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits" *(Dickerman v. Northern Trust Co.,* supra, at page 190, *ad finem);* upon his side, Osborn was entitled to exercise his own judgment as to his personal interests regardless of the welfare of the corporation or of the other shareholders *(Morgan v. Struthers,* 131 U. S. 246; *Farmers, etc. Co. v. Chicago, etc. Ry.,* 163 id. 31; *Lamb Co. v. Lamb,* 78 N. W. (Mich.) 646; *Roosevelt v. Hamblen,* 85 N. E. (Mass.) 101; *Victor G. Bloede Co. v. Bloede,* 84 Md. 129); and upon his side, Noyes was entirely free to acquire the stock, even though we indulge the extravagant, impossible and unsupported assumption that his motive in doing so was to control the corporation *(Buchler v Black,* 213 Fed. 880, 226 id. 703; *Fox v. Hale & Norcross Mining Co.,* 5 Cal. Unrep. Cas. 980, 996-7). Even if we assume the validity of a by-law which prohibits the transfer of his shares by a stockholder who is indebted in any way to the corporation, still in the instant cause we are confronted with no such by-law; nothing in the law of this corporation would have authorized it to have prohibited or restrained this transfer *(Craig v. Hesperia L. & W. Co.,* 113 Cal. 7); and even the power to "regu-

late'' the transfers of shares does not carry the power either to prevent such transfers, or to prescribe to whom the owner may sell and to whom not, or upon what terms *(People v. Crockett,* 9 Cal. 112; *Spangenberg v. Western, etc. Co.* 166 Cal. 284; *Moore v. Bank of Commerce,* 52 Mo. 377; *Chouteau Spring Co. v. Harris,* 20 id. 382; *Mundt v. Bank,* 99 Pac. (Utah) 454; *Mining v. Fos,* 84 id. (Wash.) 827; *Crenshaw v. Mining Co.,* 86 S. W. (Mo.) 260). With such matters, the corporation is not, nor are the other stockholders, in any way concerned; perhaps, the only case in which the corporation could refuse to make this transfer from Osborn to Noyes would be that in which the right to the transfer was disputed by some adverse claimant of the stock *(O'Neile v. Walcott Mining Co.,* 174 Fed. 527); and this transfer could not be denied or set aside at the instance of this company on account of fraud *inter partes (Chilkat v. Fos,* 84 Pac. (Wash.) 827). And it may be as advantageously added here as elsewhere that, since unregistered transfers are good *inter partes (10 Cyc.* 598-9, and cases cited; *Stowe v. Harvey,* 219 Fed. 17, 241 U. S. 199; *Eubank v. Bank,* 216 Fed. 833; *Bank v. Ry. Co.,* 157 Cal. 573), it was not necessary that the actual certificates should have been surrendered and reissued in 1907—the proprietory right existed without the certificate *(10 Cyc.* 389 and cases cited); the certificate is merely the paper representative of an incorporeal right; it is not in itself the property, but merely evidence of the ownership of the shares *(Jellenic v. Huron Copper Mining Co.,* 177 U. S. 1; *Pac. Nat. Bank v. Eaton,* 141 id. 227); and it is a mere symbol, often left undisturbed (see a five-year

example of this in *Anderson v. Philadelphia Warehouse Co.,* 111 U. S. 479), since even the lack of registration does not present an insuperable obstacle to corporate participation—one may be recognized as a stockholder although no certificate has been issued to him *(Cotter v. Butte Co.,* 77 Pac. (Mont.) 509; *American National Bank v. Oriental Mills,* 23 Atl. (R. I.) 795; *Green v. Galveston City Co.,* 191 S. W. (Tex.) 182). Even if it were the fact (which it was not) that from 1907 to December 12, 1912, Mr. Noyes had been a director of this company instead of being what the amended bill describes as a mere "salaried employee" (paragraph 14, page 57)—still there is nothing in the law, as we understand it, to prohibit a director from acquiring the shares of another stockholder.

The transfer of this stock from Osborn to Noyes is not, we submit, to be differentiated from the thousands of similar transactions executed daily all over the country; no fact in this case, no witness, no document, attributes to it a character *sui generis* qualified by this, that or the other limiting stipulation or peculiar feature; the only witnesses who had original knowledge of this transaction present it to us as of the most ordinary character; and after all these years, Osborn does not come forward either to impeach the transfer or to attach to it any unusual feature;—how, then, can any use thereafter made by Noyes of the stock thus received from Osborn, assuming for the sake of argument such subsequent user to have been in some way improper, reflect back to vitiate this transfer? Really, the transfer from Osborn to Noyes is one thing, but the subsequent user

by Noyes of the transferred stock, after the transfer had become an accomplished fact, is quite another thing; and even though we assume against the fact that in Noyes' subsequent user of that stock there was something regarded by this complainant as an impropriety, yet we have still to learn that a transfer of property from one grown man to another, made without any qualifying limitation, and of a perfectly ordinary character, becomes legally vitiated because the subsequent user of that property is not to the liking of some stranger to the transaction.

At the old common law, extortion was considered a crime; being a public wrong, it was punishable by indictment and prosecution at the instance of the King; under American statutes, with very few exceptions, this crime is similarly punishable at the instance of the commonwealth; and in the State of California, extortion is denounced as a felony, and is punishable by imprisonment in the State penitentiary. Extortion is defined by the criminal law of California as the obtaining of property from another with his consent, induced by a wrongful use of force or fear; and the fear which constitutes extortion may be induced by a threat, among other things, to accuse a person of any crime, or to expose any secret affecting him *(Cal. Penal Code,* Sec. 518-9). But there is not in this cause a solitary witness who pretends to testify to any fact constitutive of extortion in the original transaction; the only witnesses who speak to the point concur to repudiate extortion; there is no contradiction of their testimony; their testimony is corroborated and supported by the two letters of

December 14th and December 25, 1907, written voluntarily by Osborn in California to Noyes in Texas, at a time when Noyes in Texas was wholly ignorant of the action taken by Boyd on December 13, 1907; and even if their testimony were rejected in toto, still even that extreme and impossible condition of the record could not establish the extortion asserted by the complainant, for the reason, and it is good sense as well as good law, that a disbelief in a fact to which a witness has testified does not warrant an inference of the existence of a contrary fact as to which no one has testified *(Bank Note Co. v. McKeige,* 45 N. Y. S. 197); and since no indirection is established in the original transaction, since no subsequent improper user of the stock by the transferee (a user which we deny) can reflect back to vitiate the original transaction, what rational foundation is there here for the vociferous claim that Mr. Noyes extorted this stock from Mr. Osborn?

And if we assume, purely for argumentative purposes, however, that any wrong occurred between Osborn and Noyes to the disadvantage, say, of Osborn— as to which there is not a syllable of proof, that would be a matter for adjustment between them (compare *Burne v. Lee,* 156 Cal. 221), but such a situation would not operate a wrong to any other person. No other stockholder could step into Mr. Osborn's shoes to complain about it; while all that any other stockholder could complain of would be some corporate impropriety immediately detrimental to his personal corporate interests, no rule of law can be cited which would constitute him the avenger of Osborn's private wrongs, if any—such

an officious stockholder would be required to confine his activity to his personal interest within the boundaries designated by law, and he would not be heard to complain of Osborn's interpretation of, and fidelity to, the desires of Boyd.

It may be asked here, as it has been asked already, why, if Noyes were the real owner of one-half of the Boyd stock, he should have permitted Osborn, with four dummy directors, to run the company; but this inquiry involves assumptions which we hasten to deny. It assumes the existence of four dummy directors—a bald assumption which we repudiate and as to which we shall have more to say hereafter. It assumes that Noyes "permitted" Osborn to "run" the company—another gratuitous assumption in flagrant conflict with the facts. It assumes that Mr. Noyes was in a position to "permit" any one to "run" the company—an assumption utterly without support in the record. These bald assumptions seek to insinuate the precise acts which Noyes did not do. On the contrary, his whole effort was so to diminish the scope of Osborn's activity as to prevent any recurrence of the defalcation; his letter to Mrs. Willis, written long before any of the present trouble appeared above the horizon, evinces the liveliest interest in the welfare of the company and the necessity for limitations and restrictions upon Osborn; and the subsequent facts, terminating in the elimination of Osborn, emphasize our denial that Noyes "permitted" Osborn to "run" the company. Osborn did not run the company (whatever that may mean) by any permission of Noyes. Noyes had no permission to give

Osborn, and gave him none; Noyes did not run the company, nor did Osborn. Nor can any inference be drawn from the retention of Osborn for a time as secretary of the company; no proof has been offered that, *qua* secretary, Osborn was incompetent—no pretense that he did not understand and properly keep the books, records and minutes of the company; but his control over the funds was abruptly terminated immediately upon the discovery of the defalcations, and his activities were limited to functions purely clerical. Whether it was or was not judicious to retain Mr. Osborn in the company's service in any capacity whatever, we do not stop to consider, for the obvious reason that, assuming it to have been injudicious to have retained him, still injudiciousness is one thing, fraud is quite a different thing, and the two concepts should not be confounded.

It may be asked here, as it has already been asked, why Mr. Noyes allowed his half of the Boyd stock to remain so long in the name of Osborn. The inquiry presupposes something sinister in the circumstance that a formal transfer upon the books of the company had not been made—a presupposition which we deny. Nothing is more common than that, for one reason or another, men should permit their securities to remain standing in the names of others; and in *Anderson v. Philadelphia Warehouse Co.,* 111 U. S. 479, where the stock was permitted to remain in the names of others for a period of from five to seven years, that circumstance excited no surprise in the minds of the members of the ultimate tribunal. But the uncontradicted explanation of Mr. Noyes answers this inquiry; he tell us that

> "Osborn had been holding that stock in trust for me since December, 1907; I had not had it transferred because the company was in such a precarious position that I was staying, as all of the rest of the big stockholders did, off of the books. When we decided to make an attempt to do this work (installing the cyanide plant), I told Osborn to transfer it to me—if there was to be any responsibility to be assumed I was going to assume my share of it" (674);

and these statements of Mr. Noyes are corroborated and fortified by various considerations. His statement that the company, in December, 1907, was in a "precarious position" cannot be gainsaid; it closed the year 1907 with an operating loss of $11,505.91; the grade of the available ore was low; the price of silver had fallen; and so desperate had the situation grown that on December 13, 1907, a resolution was adopted shutting down the mine and ordering the discharge of all of its employees. Mr. Noyes states that he was staying off the books, following the example of the rest of the big stockholders; and we know beyond peradventure that on December 13th, Boyd himself inaugurated this movement by resigning as president and director, and by turning over the Boyd stock to Osborn; during 1908, Mrs. Willis did the same thing with her stock, turning it over to Miss Doherty; and during the same year Mr. Mills did the same thing, turning over his stock to the complainant and others. These people were the "big stockholders" in the company; and with their example before him, nothing unusual, unprecedented or peculiar can be found in Mr. Noyes following that example and himself keeping off the books. And his position is further fortified by the consideration that during all the

time that the stock remained in Osborn's name, Osborn procured no "other purchaser"; and there is not in this record from beginning to end a syllable of evidence to establish the faintest intention on his part after December, 1907, to procure another purchaser; and this course of conduct upon Osborn's part was in itself a recognition of Noyes' rights in the stock. That Osborn needed money his embezzlements sufficiently demonstrate. There is not an item of proof that any other restraint, except his knowledge of Noyes' interest in the stock, prevented him from obtaining the money that he needed by disposing of the stock; if it was his own stock, if Noyes had no interest in the stock, what fact can these complainants lay a finger upon which furnished any impediment to a sale of the stock by this needy owner? And we have no evidence before us to justify any finding as to the position of this stock upon the market between 1907 and 1912; for anything that appears to the contrary that stock could well have been sold by Osborn.

Moreover, even if we concede, purely, however, for argumentative purposes, that the failure upon Noyes' part to have his half of the Boyd stock instantly reissued to him is a circumstance against him, still, if his conduct and that of the board of directors in the matter of the acquisition of Section 5, and in the subsequent matters of the fifty cent lease, the so-called bonus resolution and the contract of November 19, 1913, were fair, as they were, and if such arrangements were within the power of these parties to make, as they were, and if these subsequent contracts were not of disadvantage to the corporation, and they were not, this complainant

was not wronged, and cannot complain of Noyes' failure to have had the stock transferred upon the books of the company. But no question as to any sham transfer from Osborn to Noyes has ever been raised in this cause, nor any claim that the transfer was temporary; on the contrary, the persistent insistence has been that the transfer was permanent and anything but sham; what matters it, then, whether Mr. Noyes allowed his stock to remain in the name of Osborn until the necessity arose for a formal transfer on the books?

There is one other phase of this Osborn stock episode to which a moment's attention may be directed. When the shortage was discovered, that discovery came home with especial force to Mr. Noyes, then engaged in the endeavor to install the cyanide plant which alone could save the company from destruction, and then burdened by the contracts and other obligations incidental to that installation; as a matter of company history, he knew that a defalcation had once before occurred; he was extremely desirous to rehabilitate this company and put it, if possible, upon a paying basis; his letter to Mrs. Willis fully reflects these views; and upon learning of the Osborn shortage, he felt, as any man in his situation well might feel, that a reorganization of the board of directors would be at least one step in the direction of preventing any recurrence of this unfortunate incident. When knowledge of this shortage was conveyed to Mrs. Willis, a new factor entered into the situation. The Willis, Boyd and Osborn families had been friends for many years; the relations among them were not only those of a business and social nature, but

involved personal affection as well; and Mrs. Willis was particularly concerned on account of Mr. Osborn's wife and children. Influenced by these considerations, she resisted all unnecessary publicity as to this shortage, and earnestly desired that for the sake of Osborn and his wife and family, Osborn's wrongdoing should be kept as quiet as possible. Mrs. Willis gave clear expression to her views in this regard when she was consulted by Mr. Noyes, and she was particularly anxious to avert the disgrace which might be brought upon the Osborn family if the father's wrong became unnecessarily bruited abroad. Naturally, as a business man, Mr. Noyes could not help but realize the disastrous effect which the publication of this defalcation would have upon the company itself; this consideration was quite in addition to that which urged Mrs. Willis to plead for protection for the Osborn family; and it was a consideration of practical business value as might be illustrated by the innumerable cases wherein, not only for reasons of affection, but also for reasons of good business, undue publicity of defalcations is avoided. But while Mr. Noyes and his brother both realized the immense harm which would be done the company, in its then tottering condition, by giving undue publicity to this defalcation, still neither of them ever suggested any secrecy or concealment of the defalcation, but the request to avoid undue publicity, came from Mrs. Willis. If there were any avoidance of publicity of this wretched situation, that avoidance was an avoidance originating with Mrs. Willis and suggested by her motive of affection for the wife and children of Osborn; we do not dis-

cover either W. S. Noyes or his brother suggesting any concealment of this shortage, keenly though they realized the great disadvantage and harm which would result from publicity. There was, of course, no duty to disclose this defalcation to the general public; there is no proof that a single other stockholder than Overton was ignorant of it; and there was no reason why Overton should have been ignorant of it, because, if he had taken the slightest trouble to have kept in touch with the company's affairs, he would have learned of it—he could have learned of it from the books as he says he did later on. And if Overton had learned of this defalcation in January, 1913, would he, unless a mad man, have given such publicity to the shortage as would have brought down upon this tottering corporation a battalion of anxious and vociferous creditors? What indeed would he have had to gain by publicity except possibly the malicious pleasure of accomplishing utter and final ruin of the company? What possible inference, then, disadvantageous to Mr. Noyes, in the matter of this Osborn stock, can be extracted from the facts surrounding the discovery of the shortage? The same influences, circumstances and motives operated the retention of Osborn for a time after the shortage was discovered, as secretary of the company; but as we have already pointed out, Osborn's handling of the corporate funds abruptly terminated with the discovery of his shortage. And so far as the extraordinary claim that an allowance was made to Osborn out of Mr. Peat's salary, is concerned, that may be dismissed with the observation that there is no proof whatever in this record to establish it.

Some criticism has been suggested, though offered in what seems to us to be a rather half-hearted fashion, concerning the pledge which Mr. Osborn made to Mr. Noyes of his, Osborn's, share of the stock, to secure the promissory note given Mr. Noyes when Mr. Noyes loaned the money to make good the shortage. The large use of corporate stock certificates as collateral security is so well recognized that a court, we think, should hesitate a long time before declaring so familiar a transaction to be indicative of fraud *(Masury v. Arkansas Natl. Bank,* 93 Fed. 603). A transfer on the books of the company not being essential to the validity of such a pledge *(Spreckels v. Nevada Bank,* 113 Cal. 272; *McClung v. Colwell,* 89 A. S. R. 961), it is not uncommon for both pledgers and trustees to allow the stock to stand in their names *(10 Cyc.,* 696-9). The delivery of the certificate is however essential and is not a wrongful act; indeed, either that or a transfer of the shares is the usual procedure *(Robertson v. Robertson,* 71 N. E. (Mass.) 571; *In re Darrow's Estate,* 118 N. Y. S. 1082; *Andrews v. Guayaquil Ry.,* 75 Atl. (N. J.) 812). Mr. Noyes had, of course, the right to retain the stock until Osborn paid the debt *(Cross v. Eureka, etc. Co.,* 73 Cal. 302); as pledgee, he was entitled to the control of the pledge *(Christian v. Atlantic, etc. Ry.,* 133 U. S. 242). And he was entitled to collect any dividends which might accrue upon the stock until the debt was paid *(Reed v. Coldwell,* 48 S. E. (Ga.) 191), but as the increment of the thing pledged to be accounted for later *(Union Trust Co. v. Haseltine,* 86 N. E. (Mass.) 777; *Booth v. Cons. Fruit Jar Co.,* 114 N. Y. S. 1000). And in cases where

a certificate of stock is attached as a pledge to a note, the pledge can be satisfied by a sale of stock without any determination of the rights of the purchaser as between himself and the other stockholders. The purchaser at such a sale would become entitled to the number of shares purchased, and would occupy the same position in relation to the corporate property that the other stockholders would occupy, and would have whatever rights they might have *(South Dakota v. N. C.,* 192 U. S. 286, 313). Bearing these general ideas in mind, what was in any way wrong about the act of Mr. Noyes in making this loan to Osborn or the act of Osborn in executing the note and securing it by the pledge of this stock? Mr. Noyes was entitled, under the Boyd-Osborn-Noyes arrangement to one-half of the stock which Osborn had received from Boyd; Osborn recognized this right of Noyes by retaining the stock in his possession for the term of about five years without attempting to dispose of it, and by making the transfer to Noyes upon Noyes' request in 1912; but since Osborn needed the funds to make good his shortage, what was there to prevent Noyes from loaning him the necessary amount of money, taking his note and having that note secured by the other half of the stock which had been given Osborn by Boyd? Is it not clear that this transaction, standing by itself, carries no inherent vice? The claim of the complainant, however, is that Noyes obtained from the corporation through the bonus resolution of February 15, 1913, the money which he so loaned to Osborn; but, did the company get no return for that money? The proof shows that the company received a

full equivalent for that money in ore delivered and ready for shipment to the mill; and so advantageous was that ore to the company that within the year 1913, the company had progressed from an overdraft of over $3000 on January 31, 1913, to the following condition:

It had paid for equipment	$36,615.44
Cash on hand	9,136.56
Supplies on hand	11,409.23
Total	$57,161.23
It owed	23,061.60
Net	$34,099.63

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SECTION 5.

The history of Section 5 exhibits no wrongdoing or lack of fairness upon the part of William S. Noyes as against this corporation or any of its stockholders.

In a general way, we have hitherto seen something of the history of this Section; we know something of its early vicissitudes; we know of its purchase by Mr. Noyes, the individual; we know of the publicity given to that purchase, not only by communication of Noyes directly to the leading stockholders, but also to all stockholders through the annual report of 1913, produced as an exhibit by this complainant; we know of the willingness and offer of Noyes to convey the section to this company for what it cost him; we know that the company, because of financial inability could not, and did

not, accept his offer; we know generally of the subsequent relations between Noyes and the company in respect to this section; and we come now to inspect a little more closely the acquisition by Mr. Noyes of this Section with a view to ascertain what, if any, fraud tinged his conduct in that regard.

1. The governing purpose in Mr. Noyes' mind was the rehabilitation of the company; no unfairness characterized his intentions or his acts.

His plans for the betterment of the company are visible in the efforts which he made nearly a year (658) prior to December, 1907, to establish the cyanide plant, —before Osborn had received a share of the Boyd stock, before he himself had received a share of the Boyd stock through Osborn. He renewed these same efforts in 1912, with more success; the cyanide plant was established through his energy and credit; and he who should deny that these efforts of Mr. Noyes did not bring about the salvation of this company—efforts so alien from what one would expect if one judged from the vociferations of this hysterical complainant—should not, we submit, complain if his denial should not be taken seriously. And so, also, with his letter to Mrs. Willis; even, it would seem, to those so unhappily mentally constituted that they see no good in humanity and go about in this world with the set purpose of establishing their pessimistic thesis, one would suppose that this letter would appeal as revealing a most earnest purpose to advance the welfare of this company; no other criticism of it, we think, would be just; no other criticism could, we think, be made except by indulging

a riotous imagination unresponsive to any fact in the record, and except by that process of piling assumption upon assumption which was so severely condemned in the Ross case (92 U. S. 283, 284).

And so also with the fifty-cent lease of January 25, 1913, his motives and purposes here all look to the welfare of the company; and it may well be asked what indeed, whether in law or in morals, was wrong, or in any way detrimental to this company, with an expectation on Mr. Noyes' part of assisting this decrepit corporation, by leasing Section 5 to it—what was wrong with leasing this Section at a nominal rental to help a company that had neither the purpose, funds, nor credit with which to purchase it? That the rental received was nominal and grossly unfair to Mr. Noyes, we shall see more at length when discussing this lease; but unfair as it was, Mr. Noyes submitted to it until the crisis had passed and the cyanide plant had become a practical working certainty; and if his purpose had been to wreck the company, it is incredible to suppose, that, instead of assisting, even to the stripping of his personal credit, he would not have seized the opportunity presented by the situation in the fall of 1912, and would not then have strangled the company.

Nor was there anything unfair about Mr. Noyes borrowing the purchase money of Section 5, even if we assume that he then entertained the purpose, hope or expectation of ultimately recovering that money from the company. What, under all the facts and circumstances of this present case, was there about such conduct that was any fraud upon this company or any of

its stockholders? If, having the funds and the credit that the decaying corporation was stripped of, he had stood apart, coldly indifferent, callously awaiting the inevitable debacle, who could say that such an attitude was a fraudulent one, or expect to be taken seriously if he did so? No rule that we are aware of required Mr. Noyes to expend his private funds or pledge his individual credit to save this corporation. But if Mr. Noyes did that which he was not legally compellable to do, if he did employ his private resources to acquire Section 5 with the intention of later passing it on to the company, and of ultimately being repaid his expenditures by the company, what was in any way wrong about that? There was certainly no wrong if his purpose was to recover the money legitimately: no proof is made that his purpose involved any illegitimacy or any detriment to the company; the only available proof shows his persistent desire for the rehabilitation of the company with which he had been connected for so many years; and if, originally, he had fairly acquired Section 5, so that it became his property, what wrong or fraud did he commit in any of his acts in so far as they concerned a company which was itself financially impotent to acquire the section? Considering all the facts, fully, and with due appreciation of the precarious condition of the company, what was wrong or unfair about the fifty cent lease, the resolution of February 15, 1913, or the agreement of November 19, 1913, that any stockholder of this company, who was not seeking pretexts upon which to "control the management" (letter, Overton to Gleim, 623-4) had any just cause to complain about. He took

no unreasonable advantage of this company; his conduct upon the acquisition of Section 5 was wholly inconsistent with any thought of wrong to the company to which he had given the best years of his life; if he had intended anything of that sort, all that he had to do was to stay his hand, terminate his activity and pursue a policy of passivity; and his *ante litem motam* letter to Mrs. Willis, of itself, shows that from the first he had the best interests of the company in mind—a view fortified and confirmed by all the prospectant, contemporaneous and retrospectant facts. Even though, for argumentative purposes, one were to assume that his motives were not altruistic, it would still be true that, whatever motives may be assumed to have governed him, if his acts were within the law, those assumed motives would disappear from judicial consideration, for the obvious reasons that the doing of a lawful act by all the powers enabling one to do it is not fraud, and is not subject to any legal censure *(Jaster v. Currie,* 198 U. S. 144-148; *U. S. v. Isham,* 84 U. S. (17 Wall.) 496), and that "if the act of an individual is within the terms of the law, whatever may be the reason that governs it, or whatever may be the result, it cannot be impeached" *(Doyle v. Continental Ins. Co.,* 94 U. S. 535); but his acts, as well as his positive declarations exhibit his worthy motives *(Craig v. Radford,* 3 Wheat. 599); and since he was himself a stockholder in this company, this would be but an additional circumstance tending to negative the theory that he harbored evil designs upon his own company. That Mr. Noyes had no motive or desire, and could have no motive or desire, to injure the company is further fortified by

the fact that in order to reorganize the company by putting at its head a responsible and interested president, he, with Mrs. Willis and Osborn, contributed 10,000 shares of the capital stock of the company which was transferred to his brother, B. S. Noyes, in February and March, 1913 (753-4). Would he at one moment raise the hopes of his brother by contributing stock toward a respectable interest in the company to compensate him for services rendered and responsibility assumed by becoming president of the company and, at the next moment, dash those hopes to the ground by an endeavor to injure or ruin the company? Why, indeed, should Mr. Noyes desire to injure the Presidio Mining Company by any hostile use of Section 5? In *Barr v. Pittsburg Plate Glass Co.,* the learned judge after referring to the fact that Captain Ford was a large stockholder in the Glass Company, and that his two sons were also stockholders therein, observed that "it would then be unreasonable to suppose that he intended to injure the company" (51 Fed. 34, *ad finem);* and so again, in speaking upon this topic, the learned judge further said:

> "The Pittsburg Plate Glass Company, did not have, and could not expect to maintain a monopoly of this growing industry. That the building of the Ford City works was in itself 'a menace' to that company is an unwarrantable assumption. Moreover, those works were in friendly hands. It is incredible that the defendants would have run them to the prejudice of a company in which they had interests so large."

And so, also, in the same case on appeal, the Circuit Court of Appeals, speaking of Mr. Ford remarked:

"He desired to establish other works for the purpose of extending the business which produced such a profitable return, to be operated in harmony with Creighton, and not to its injury; and being a stockholder of the Pittsburg Plate Glass Company, did not deprive him of the right to do this. His two sons were also stockholders and it would be unreasonable to suppose that he intended to defraud and injure a company in which he and his sons were so largely interested * * * The interests of the defendants in the Pittsburg Plate Glass Company were so large at this time as to exclude all idea of their intention to depreciate their value or to diminish their profits.

On the contrary, they had the strongest motive to protect their interests, to make them still more profitable and to ward off competition as long as possible. Having purchased the required land, they proceeded to build the works with their own capital and on their own credit, with the knowledge of and without objection from the plaintiff or any other minority stockholder."

Barr v. Pittsburg Plate Glass Co., 51 Fed. 33; affirmed on appeal 57 id. 86.

And see this case cited as authoritative in *Cowell v. McMillin,* 177 Fed. 25, 39.

Not only, then, is it impossible to ascertain why Mr. Noyes should desire to injure a company to which he was attached by the sentiment springing from long and intimate association, in which Mrs. Willis, the widow of his dead friend, and for whom he desired to do something, was a stockholder, and in which he was himself a stockholder, by creating an unfriendly competition, but, also, what unconscionable advantage, pray, was taken by Mr. Noyes over this company, whether in lease, resolution or agreement? He was under no obligation whatever to devote any of his private property to the preservation of this tottering company; but he did so,

and it was not for this company, defeated by adverse fortune, to make the terms; it was for him to make the terms as he had made the sacrifice; and had he received far more than he did, it would still not lie upon the lips of this company that he saved to deny what was asked by its savior. The fifty cent lease was grossly unfair to Mr. Noyes; he did not receive much more than half of what the resolution of February 15, 1913, purported to give him; and it was not for this company, or for anyone else, least of all this complainant (608 *ad finem),* justly to complain of the equality of the division of the net; what unconscionable advantage did Mr. Noyes take —what normal conscience, unquickened into hypersensitiveness by an overweening desire "to control the management" (letter, Overton to Gleim, 623-4), could reasonably be shocked by any of these arrangements, all of the surrounding circumstances being adequately considered? There is, we submit, no fraud whatever, nor any inequity in a man making a fair bargain, or the best bargain that the circumstances will permit, with another, as to property owned by himself; if there were, ninety per cent of this world's business would stop.

As already pointed out, his efforts were directed, not to the wrecking of this enterprise, but to its rehabilitation; and if his purpose were to absorb the Presidio Mining Company, nothing could have furthered that plan more effectually than the deadening apathy of the stockholders at that critical time. If, instead of assisting the company, he had stood back and permitted the company to go to ruin, nothing could have been easier,

than thereafter to reassemble the fragments and renew the enterprise.

2. So long as he violates no duty to his corporation or its stockholders, even a director is entirely free to engage in an independent, competitive business, either in his own behalf, or for another corporation of which he is likewise a director.

Mr. Noyes did not become a director of the Presidio Mining Company until January 31, 1913, after he had acquired practically all the stock of the Silver Hill Company. During 1912, and up to the date when Mr. Noyes first became a director, the Presidio Company had no right, title, estate or interest in Section 5, other than such rights or privileges as it may have been given by the fifty cent lease of January 25, 1913; and consequently, when Mr. Noyes was engaged in acquiring the Silver Hill Stock, it was not possible for him to acquire an interest in Section 5 adverse to the Presidio Mining Company. The acquisition of an interest in property adverse to that of one's corporation, presupposes that one's corporation has an interest in the property such as to make the acquisition adverse; but here, prior to January 25, 1913, the Presidio Mining Company had no interest of any kind in Section 5; and after that date, it was Mr. Noyes' lessee. And it is to be observed, moreover, that in acquiring the Silver Hill Company's stock, Mr. Noyes was not acting for the Presidio Mining Company, was not its agent to purchase, had not been either authorized or commissioned in any way whatever to obligate the Presidio Company in the matter of that purchase, and was acting in his individual capacity only.

Not only was there nothing secret about Mr. Noyes' acquisition of Section 5, not only was the Presidio Company without the intention or the means to make the purchase, but the purchase by Mr. Noyes in no degree balked the Presidio Mining Company in effecting the purpose of its creation, established no antagonism to its interests, was followed by no user detrimental to that company—on the contrary, the purchase by Mr. Noyes of Section 5, a transaction hopeless of accomplishment by this moribund corporation, turned out in the end to be the one thing that has made this enterprise a radiant prize for those who held back their dollars, their faith and their energy during the times of storm and stress. The test is whether there was a specific duty on the part of Mr. Noyes to act or contract in regard to Section 5 as the representative of the corporation; if there were no such duty, the foundation for this litigation disappears; whether such specific duty was imposed on Mr. Noyes to act for the corporation in this purchase is a question of fact; where the corporation is, for example, financially unable to undertake the transaction, the duty in question does not exist; and the fact that during the time when he was acquiring the Silver Hill Company's stock, Mr. Noyes was the superintendent of the Presidio Mining Company, does not authorize the inference that he was acting as such in the transaction of the purchase of Section 5 *(Hubbard v. Todd,* 171 U. S. 474-499).

If a stockholder or director may contract or deal with his own corporation, why may he not do so with a stranger? So far as dealings with one's own corpora-

tion are concerned, it is submitted that no valid reason can be assigned for the application of supernatural tests to contracts or dealings between the corporation and its directors or officers or stockholders; every man is presumed to do the correct thing until the contrary is proved *(Bank v. Dandridge,* 12 Wheat. 69): "It is not to be presumed that parties intended to make a contract which the law does not allow" *(Ky. Bank v. Adams Express Co.,* 93 U. S. 181; *Mines Supply Co. v. Bank,* 173 Fed. 859; *McKell v. Chesapeake R. R.,* 175 id. 321); and there is nothing whatever in the law to prohibit directors, officers or stockholders from contracting with their corporation *(Robinson v. Muir,* 151 Cal. 118, 122, *ad finem).* A director may become a creditor of his corporation and as such share in the distribution of its assets; a stockholder has a legal right to be influenced by what he conceives to be for his own interest, nor can this right be limited by the fact that he is a director—one does not cease to be a stockholder because he becomes a director; and "a sale of property by a director to his corporation is not void" *(Herbert Kraft Co. v. Bryan,* 140 Cal. 73, 79; *Schnittger v. Old Home Mining Co.,* 144 Cal. 603; *California Land Co. v. Cuddeback,* 27 Cal. App. 450). The validity of contracts between directors, officers or stockholders and the company does not depend upon any absolute or arbitrary rule. Such contracts are not void because of any fiduciary relation between the parties *(In re Castlebraid Co.,* 145 Fed. 224); no corporation can, nor is it submitted will any court, at its mere option, and without inquiry into the question of fairness under all the circumstances, avoid

a contract made with the directors; and the true rule is, we submit, that the validity of such contracts, and/or the right to disaffirm them, depends upon the nature and terms of the contract itself, the circumstances under which it was made, and the effect of its provisions; and then, if, after careful consideration and analysis of these features, it is found that the contract is fair, and especially if it be beneficial to the corporation, it should be upheld and enforced precisely like any other contract.

For example, a corporation is not precluded from contracting with its bondholders because they own all the stock (*Memphis Ry. Co. v. Dow,* 19 Fed. 388); there is nothing to inhibit a stockholder from representing a third person in a business transaction with the corporation (*Wann v. Scullin,* 109 S. W. (Mo.) 688); nor is a director or officer disabled from selling or leasing his property to the corporation, provided that there are enough directors present who have no personal interest in the property, and the transaction is fair (*Howland v. Corn,* 232 Fed. 35; *Proctor v. Piedmont Co.,* 67 S. E. (Ga.) 942; *Baker v. Power Co.,* 112 Pac. (Wash.) 647); and the mere fact that the president who owned the majority of the stock was guilty of such fraud in procuring the execution of a contract as will warrant its setting aside on a bill filed by the corporation, will not justify the court in setting it aside at the suit of a minority stockholder (*Carson v. Alleghany Glass Co.,* 189 Fed. 791). The doctrine has thus been summarized:

> "The doctrine that officers and directors are trustees of the stockholders applies only in respect to their acts relating to the property or business of the corporation.

> It does not extend to their private dealings with stockholders or others, though in such dealings they take advantage of knowledge gained through their official position. Moreover, the duty of officers and directors is only coextensive with the trust, and good faith to the corporation does not require that they should steer from their own to the corporation's benefit enterprises or investments which, though capable of profit to the corporation, have in no way become subjects of their trust or duty."
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> *21 Am. & Eng. Ency. Law,* 2nd Ed. 898 (citing many authorities).

And, of course, an employee occupies no fiduciary relation to the corporation, and may deal with and act towards it as a stranger.

Union Ry. Co. v. Dull, 124 U. S. 173;
Palmer v. Cypress Hill Cemetery, 122 N. Y. 429.

In this connection it may be well to refer, with some particularity, to *Cowell v. McMillin,* 177 Fed. 25. There, the suit was brought by a stockholder against the defendant McMillin and the corporation; the customary accusations were made, of fraud, concealment, deceit, corporate control, dummies, user of company property for personal gain, denial of access to corporate books and records, and the like; the answer met the bill; the hearing resulted in a decree for the defendants; and this court affirmed the decree, holding that the lower court was right in dismissing complainant's bill. The defendant, McMillin, was the president, general manager and director of a Washington lime company; just as Mr. Noyes was, since January 31, 1913, the vice-president, general manager and director of a California mining company. McMillin contracted individually for the exclusive license for the State to use a patent

barrel-making machine; just as Mr. Noyes contracted individually for the exclusive title to Section 5. Thereafter the lime company, by the unanimous vote of the other directors, McMillin not voting, made an agreement with McMillin whereby he leased this barrel-making plant and contracted to supply barrels to it at a stated price; just as the mining company, by a unanimous vote of the other directors, Mr. Noyes not voting, made an agreement with Mr. Noyes whereby he leased Section 5 to it and contracted to supply ore to it at a stated division of the net. Mr. McMillin operated under his agreement for a number of years at a profit; while Mr. Noyes operated under his agreement upon an equal division of the net profit between himself and the mining company. At the time when the lime company made its contract with McMillin, the latter did not have a controlling interest in the company, nor control the other directors, each of whom owned a considerable amount of stock; just as, at the time when the mining company made its contract with Mr. Noyes, the latter did not own a controlling interest in the company, nor control the other directors, each of whom, except one, owned a considerable amount of stock. The patent machine was first offered to the lime company, was discussed by the directors, and urged by Mr. McMillin, but the other directors refused to risk the money and acquiesced in its acquisition by McMillin; just as Section 5 was offered to the mining company, was discussed by the directors, and was urged by Mr. Noyes, but the other directors refused to risk the money and acquiesced in its acquisition by Mr. Noyes. At the time of

the making of the lime company contract, the directors had as full knowledge of the patent machine as McMillin did, but did not share his confidence in its successful operation; just as, at the time of the making of the mining company contracts, most of the directors of the mining company knew as much about Section 5 as Mr. Noyes did, but though one of them (Miss Doherty) relied upon Mr. Noyes' statements concerning it, yet not in one particular has he been shown to have made any misstatement concerning it; none of the directors shared Mr. Noyes' hopes sufficiently to advance one penny toward the purchase of Section 5—to quote the supplemental bill in this cause (Par. VII, p. 233), the purchase price was "advanced by him". A very determined effort was made to upset the agreements between the lime company and Mr. McMillin, but both courts held that those agreements were not fraudulent and illegal, but were fair and valid.

In delivering the opinion of this court, the learned author of that opinion pointed out that the main point in the case related to the license to use the patent barrel machine with which the lime company made its barrels; this was the license which had been acquired individually by the defendant McMillin; just as, in the cause at bar, the main point in the case—so recognized by the learned judge below (419)—relates to Section 5 which had been acquired individually by the defendant William S. Noyes. It appears from the opinion of this court that much the same contention was presented as to the license as is presented here as to Section 5, counsel contending "that McMillin, a corporate officer,

was guilty of fraud; that he violated his trust by leasing and purchasing the property of the corporation, and by making a contract with the corporation for his own personal benefit, and that, as a consequence, the law will regard him as a constructive trustee liable to an accounting or such other obligations as equity may properly impose''; but this contention was rejected by both courts. The learned author of the opinion of this court then explains some of the previous history of the lime company, from which exposition it is interesting to observe, *inter alia,* that the lime company also, like the mining company in this cause, had its non-dividend period, the learned judge pointing out that ''it paid dividends amounting to $35,000, between 1888 and 1892, but has paid none since, although its assets have been added to in many ways and its trade has been extended''. It appears from this opinion that in 1889, Mr. McMillin heard of the patent barrel machine and, because the question of barrels was a most important one to the lime company, McMillin got into touch and discussion with the patentee; just as, when Mr. Noyes heard that Section 5 was on the market, he got into touch and discussion with the principal stockholders and urged its acquisition. McMillin testified that the proposition to purchase the patent barrel right was discussed by the patentee and members of the board of directors, *that the discussions were informal,* but the matter was before the board several times, he, McMillin, urging the board to take up the patent; just as Mr. Noyes testified, without contradiction and with corroboration, that the proposition to purchase Section 5

was discussed by the members of the board of directors, that the discussions were informal, and that this matter was discussed several times, Mr. Noyes urging the propriety of the acquisition. In the lime company case, "*the board declined to become interested because of the financial condition of the company,* and of the country at large and because of doubts of the success of the plant"; and in the cause at bar, the same reason prevented the acquisition of Section 5, the company declaring that "said Noyes offered to this corporation the opportunity to purchase said Silver Hill mine at the cost thereof, but this company was unable to purchase the same and declined to do so, because of its financial inability" (874). When the lime company declined to take up the patent, McMillin did so individually; just as, when the mining company declined to take up Section 5, Mr. Noyes did so individually. When Mr. McMillin acquired the patent, it was understood that if the machine turned out to be a practical utility, the lime company should have the first opportunity to obtain its product; and a parallel for this fact may be found in the cause at bar in Mr. Noyes' declaration that the mining company could take Section 5 off his hands at cost whenever it was able to do so.

The learned judge then goes into a painstaking examination of the testimony, from which the conclusion emerges that financial conditions furnished one of the leading motives why the lime company declined to acquire the patent. It was further pointed out that McMillin concealed no knowledge that he possessed, in respect to the probable success of the machine; that he

misrepresented nothing; that he had more confidence than the others; that he did not himself know that the venture would turn out to be the success that it afterwards proved to be—a feature corroborated by the right given to McMillin to cancel the contract at the end of a year (in the cause at bar, on thirty days' notice; 856, 877); that

> "the other directors of the company were largely interested and, while to a great extent they relied on McMillin's integrity and business abilities in and about the management and policies of the company and its affairs, they acted against his advice in this instance, and did so under the belief that they were guarding the best interests of their company; and, consistent with their past conduct, their attitude in this suit is not only not one of complaint against McMillin's actions in the premises, but of affirmance of what transpired between him and themselves, and of the good faith of the whole transaction of the barrel patent license and contract"—

all of which features are equally characteristic of the situation presented here. It is pointed out, also, that McMillin did not vote upon the lime company contracts; and here, Mr. Noyes did not vote upon the mining company contracts. And the inquiries made in the cause at bar, relative to Mr. Noyes' acquisitions of the capital stock of the Presidio Mining Company since the commencement of this suit (775-6) recall the following pertinent observations of this court:

> "Furthermore, the evidence is that McMillin did not vote upon the question of entering into the contract of lease, and that when the contract was made, he had not contracted for the purchase of any of the holdings of other stockholders. The fact that afterwards, in 1894, he bought the stock of other directors, is immaterial, unless the facts or circumstances surrounding such purchase tend in some

> way to show fraud on McMillin's part, or conspirary between the associate directors and McMillin at the expense of the corporation's and complainant's interests when the contract was made".

After discussing the industrial features of the contract and the figures of the experts, absolving McMillin of unfairness and adverting to the general rules applicable to cases of this impression, the learned judge took up and disposed of *seriatim,* the various claims of the complainants..

On pages 40 and 41, the learned judge dealt with the matter of the increase of McMillin's salary; it was recognized that when this increase of salary was voted, three of the four individual members of the board who voted for the increase which doubled McMillin's salary, had contracted to sell all their shares, except one each, to McMillin, retaining the stock as collateral, however, and reserving the power to control and vote the stock until the purchase price notes of McMillin were paid; but, nevertheless, the learned judge pointed out that

> "of course, they (these directors) were interested in the payment of the notes due by McMillin, but said interests were not incompatible or necessarily in conflict with their interests in the success of the corporation, which were presumably sufficient to prevent them from sacrificing its welfare and, by corrupt ways, its funds".

It was held that there was no satisfactory evidence upon which to base the conclusion that the action of the directors in doubling McMillin's salary was to be attributed to any corrupt or false motive; it was pointed out that these directors were men of business standing; and the position was taken that

> "it is not at all reasonable to believe that their action as directors was prompted by any course other than careful regard for what seemed to them to be the interests of the corporation".

Reference is then made to McMillin's financial position and to his alleged concealment from the minority stockholders of facts tending to throw light upon corporate affairs with which he was connected; and the very just observation is made that

> "inasmuch as McMillin's personal account was credited with the amount of his salary on the books of the corporation, it is impossible to believe that complainant did not know what salary was being paid".

And in the cause at bar, it is impossible to believe that had this complainant maintained the slightest interest in the affairs of the mining company from 1908, when he became a stockholder, to 1915, when he commenced this litigation, he could not have failed to have known what salary was being paid to Mr. Noyes, —a salary which Mr. Noyes had been receiving since 1884, and a salary which was from month to month, and from year to year, referred to in the records of the company and repeatedly mentioned in its minutes.

The learned judge then took up the accusation made against McMillin of deception and concealment at a stockholders' meeting in withholding information from the complainant. While McMillin answered many of the inquiries propounded by the complainant and his counsel, just as many of the inquiries propounded by the present complainant were answered in the cause at bar, still McMillin admitted that he refused information concerning many matters, because he did not wish the

complainant to use the information obtained against the company; and the court observes that his statement that he acted in pursuance to the advice of counsel is reasonable, and that

> "whether his conduct was legally justifiable or not, it induces the opinion that it was prompted by no purpose other than protection of what he believed were the best interests of his corporation".

While in the Cowell case, as in the case at bar, there was a stockholders' ratification, yet it was insisted that the directors of the lime company were mere dummies "because they were elected by the vote of McMillin, the holder of the majority of the shares of stock". Of course, in the cause at bar, there is not only no proof that any of the directors of this mining company were elected by the vote of William S. Noyes, but there is no proof that he was the holder of the majority of the shares of stock; nevertheless, the following language of the learned judge, used with reference to these alleged dummy directors, may be appropriately quoted:

> "In the sense that they owed their positions as members of the board to McMillin, complainant is correct; but, in the sense that they were mere creatures, willing or obligated to do McMillin's bidding, and to aid him in executing fraudulent designs, or knowingly to do any act beyond the law, or that was unfair or oppressive, or against the defendant company's interests, the contention is without merit. It is needless to do more than to state the elementary rule that the majority of the stockholders usually elect the directors, and that a corporation is represented by its directors, not by the stockholders. So, it is to the directors of a company that the management of its concerns and the power to make the contracts are given. Nor does the fact that a director only owns one share in a corporation ordinarily alter the general rule by lessening

> the power vested in him as a director, the board of directors being expressly or impliedly authorized to do all acts which are proper to carry out the corporation's chartered purposes. Directors who administer the affairs of the corporation must always use the utmost diligence, good faith, and fairness to the minority shareholders, but this duty does not affect the principle that ownership of a majority of the capital stock of a corporation gives to the holders legal power to control the corporation, lay down its policies, make themselves, or those whom they select, its directors or agents, and fix their compensation."

And the learned judge closes the opinion in this case with a remark which is applicable, we think, to the relations between Section 8 and Section 5, as disclosed in the record in the cause at bar. The learned judge said:

> "The fact that the defendant lime corporation apparently lost money between the years 1892 and 1897, and that the Staveless Barrel Company made money during that same time, would be significant if the facts or circumstances showed that the relation of one concern to the other was initiated in fraud, or, after being entered upon, became fraudulent in any way. But they do not. The lime company appears to have saved money in the item of barrels by its agreement to buy them at 30 cents; and the evidence of its losses in its lime business during the particular years mentioned shows that general business depression obtained at that time and bore heavily upon most commercial enterprises. The general results of the investment to the stockholders in the defendant lime company for the 16 years between 1888 and 1903 show a profit of $290,000 on the original investment of $100,000, and a profit each and every year except during the years of business dullness above mentioned."

We submit that the views expressed in this opinion should have a very decided influence upon the proper

disposition of the cause at bar; and as bearing further upon these matters, see

Godfrey v. McConnell, 151 Fed. 783;

Buchler v. Black, 213 Fed. 880; affirmed 226 Fed. 703;

Union Trust Co. v. Carter, 139 Fed. 717;

Fox v. Mining Co., 5 Cal. Unrep. Cas. 993;

Seymour v. Spring Forest Cemetery Assn., 39 N. E. (N. Y.) 365.

In the case last cited in recognizing the right of directors to purchase outstanding obligations of the company at less than par, and to enforce them for the full amount against the debtors, the Court of Appeals of New York remarked:

> "But the further claim is made that because Hotchkiss and Seymour were officers of the corporation, holding a fiduciary relation, as trustees or directors, they could not lawfuly buy the valid and outstanding obligations of the company at less than par, and enforce them for the full amount against the debtors. If that be sound doctrine, as is stoutly maintained,—if directors cannot, in any case, invest in the bonds of their own companies, except at the peril of a constructive fraud; if they cannot safely buy such bonds below par, because they deem them unduly depressed; if titles to corporate obligations, passing through their hands, become tainted by their touches,—it is quite time that the courts should give (what they have not given) a very definite and distinct warning."

And then, after referring to the general rule as to fiduciaries, and pointing out that the rule "must be taken with the limitations which belong to it", the learned court, in speaking of the authorities cited remarked that

> "they do not decide this case, for neither Hotchkiss nor Seymour bought in any property of the company nor dealt with the corporation in any respect. They made their contract, not with it, but with third persons, capable of protecting their own rights, and bought nothing which the corporation owned, or to which it had a right". (page 367)

We think it is well at this point to recall that in this Seymour case the property which was purchased was an outstanding obligation of the company itself; but in the cause at bar, at the time when Mr. Noyes acquired Section 5, there was no relation of any kind, class or character between the Presidio Mining Company and Section 5, whether in possession or in expectancy; Mr. Noyes did not buy in any property of the Presidio Mining Company, nor did he deal with that company in any respect; he made his contract, not with the Presidio Mining Company, but with third persons, capable of protecting their own rights; and Mr. Noyes bought nothing which the Presido Mining Company owned, or to which it had a right. And continuing the discussion of the limitations of the general rule, the learned court observed:

> "The entire basis of the rule consists in this collision between trust duty and personal interest, and the equitable prohibition has no application where there is no such possible inconsistency. There is no such conflict in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations. There is no present duty resting upon him to extinguish them. The time for that has not come; the duty has not arisen, may never arise; the corporation is not prepared to pay, does not contemplate paying, but intends and expects to await the full maturity of the debt. Unless some special fund has been provided, or some special liquidation has been or-

dered, the director owes no duty to his company to discharge or buy in the outstanding bonds, and may purchase for himself, because no inconsistent trust duty has arisen. Why should he not? While the bonds are running to their maturity, and the corporation is not able to extinguish them, is not bound to do so, does not even wish or seek to do so, what does it matter who holds the securities, or on what terms they pass from hand to hand? It seems to me that we are asked to crowd the rule almost to the verge of an absurdity, and to inflict a vital injury upon business interests by tainting with invalidity the holding by a director of the unmatured obligations of the corporation, bought by him in the open market, and not put in liquidation or sought to be extinguished. There must at least be some fact or circumstance which charges the trustee with a present duty to act for his company in respect to the bonds, which duty is or may be inconsistent with a personal purchase. No such duty rested upon Hotchkiss and Seymour, and they had a right to buy and hold for their own benefit."

The notion that when an individual becomes either a stockholder or a director, in a corporation, his legal capacity for individual effort disappears and his separate individuality is obliterated, is a wholly mistaken notion. It is "a proposition seemingly plain" that "an employee of a corporation may have a separate individuality" *(Gray v. Quicksilver Mining Company,* 68 Fed. 677, 683); and as remarked by the Supreme Court of Wisconsin:

> "We cannot think, however, that the business man who undertakes to make the affairs of a corporation or of a firm his business, and to give to it his full time, absolutely excludes himself from everything else. Usually such men have some private affairs or interests of their own, which they are not expected to entirely abandon. They may seek and make investments of their private funds, so that they do not trespass substantially upon the ordinary business

> hours; and, in analogy, it certainly is recognized as customary that they may give the benefit of their judgment and supervision to the care of moneys of relatives not able to protect their own interests. It is also certainly customary that men who consider themselves engrossed in active business do not hesitate to occupy places on the directory of banks, or even more important offices in such institutions. It would be unfortunate indeed for the community if a line must be drawn so strictly that only people whose services were not needed in the conduct of important business could occupy such positions'' * * * ''There is no evidence of any pecuniary loss to the defendant from the mere fact that plaintiff looked after his mother's estate, or after the finances of the sad-iron business, or that he occupied the vice-presidency of the bank; hence no counterclaim is sustained upon these facts.''
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> *Johnson v. Stoughton Wagon Co.,* 95 N. W. (Wis.) 394, 397.

Bearing in mind the condition, financial and otherwise, of the Presidio Mining Company during December, 1912, and January, 1913, and recollecting the overdraft and the operating loss which characterized its financial position at that time, it may not be inappropriate to refer to a recent decision by the Supreme Court of Kentucky which bears upon the matter now under discussion. In the case in question, the court pointed out that the corporation there involved, though still maintaining its corporate existence, had clearly failed in its purposes, and observed that

> ''we see no good reason why the officers and directors of such a corporation should be denied the right to make advantageous trades for themselves, when, in so doing, the interests of the insolvent, practically defunct corporation, which they represented, are in nowise prejudiced thereby''.

The court then refers to the evidence, to certain authorities which will hereafter be referred to, and then to a rule of equity which inhibits directors from injuriously affecting their own corporation,—a rule with which we have no quarrel in this case,—and then proceeds with the following observations which, we think, are not without applicability to the situation presented in the cause at bar.

> "But when said corporation is insolvent, and to all purposes dead and incapable of exercising the function of carrying out the purposes for which it was organized, its officers and directors do not owe it the duty of turning over to it the profits realized by the exercise of their skill and judgment, unless, at the time of the transaction out of which the profit arose, they were acting for said corporate interest and not in their own individual capacity. Here the corporation was to all practical intents and purposes dead. No gas had been found in paying quantities on the properties owned by it. Its resources were exhausted; its credit gone. It could not have exercised a franchise of the character under consideration. No one knew this better than appellees; and hence, when the franchise was offered for sale in 1905, fully realizing that the enterprise in which they had embarked with their Pennsylvania and Kentucky friends was an utter failure, they sought to recoup in a new deal as it were the losses which they had sustained in the former enterprise. In this particular it is apparent that they had no idea of giving to the defunct corporation the benefit of any profits that might accrue to them out of this new venture. They acted for themselves alone. Since the Appalachian Gas Company had neither the means with which to buy nor the occasion to use, if it had owned, the franchise in question, we fail to see wherein the stockholders of said company are justified in charging that appellees, in refusing to give to said company the benefits and profits realized by them in the purchase and sale of this franchise, have been recreant in discharging any duty which they owed to the said Appalachian Gas Company; or that they enriched

themselves at the expense of this company. On the contrary, it is apparent that throughout the whole history of this case their conduct has been fair and honorable. They did everything that they could to make it a success, and, not until it had been thoroughly demonstrated that it was an utter failure did they enter into negotiations with a different company, which resulted in bringing to them profits, for which they are now asked to account. Under such circumstances, it would be manifestly unjust to require them to surrender to the Appalachian Gas Company the profits thus realized by them.

This view being in accord with that of the Chancellor, the judgment is affirmed."

Jasper v. Appalachian Gas Co., 153 S. W. (Ky.) 50, 55.

When the Supreme Court of New York had occasion to consider the matter now under investigation, the following opinion was expressed:

"But I know of no rule which prohibits a director of a corporation engaging in a business similar to that carried on by the corporation, either in his own behalf or for another corporation of which he is likewise a director. True, he owes to his stockholders the most scrupulous good faith. He may not deal in his own behalf in respect to any matter involving his rights and duties as a director. He may not seek his own profit at the expense of the company or its stockholders. But, so long as he violates no legal or moral duty which he owes to the corporation or its stockholders, he is entirely free to engage in an independent competitive business."

New York Automobile Company v. Franklyn, 97 N. Y. S. 781, 785.

So, in *Barr v. Pittsburg Plate Glass Company,* 51 Fed. 33, affirmed on appeal, 57 id. 86, and cited as authoritative by this court in *Cowell v. McMillin,* 177 id.

25, 39, the learned Circuit Judge at *nisi prius* declared that so long as the defendants other than Captain Ford acted in good faith to their associates in the Pittsburg Plate Glass Company,

> "I am not prepared to say that the fact that they were directors and officers in that company debarred them from engaging in the independent manufacture of plate glass, especially in a place where that company was not authorized by its charter to operate;"

and upon appeal, the Circuit Court of Appeals pointed out, speaking of J. B. Ford & Company, stockholders in the Pittsburg Plate Glass Company, that

> "they did not use the property or the credit of the Pittsburg Plate Glass Company, nor were they under any obligation, legal or equitable, which prohibited them from erecting the new works, and consolidating them with the Creighton Works, on terms which have proved to be equally beneficial to all the parties concerned".

And another interesting case in which recognition was given to the principle of freedom for which we are contending, is that of *Consolidated Fruit Jar Company v. Wisner,* 93 N. Y. S. 128; and in that case, the facts relevant to the present inquiry were that Wisner, the defendant, was a trustee, or director, and also president of the plaintiff corporation, that as such president the defendant had the chief management, control and supervision of its business, and that during the period covered by the complaint he was also engaged in an independent business as a dealer in articles of the kind manufactured by the plaintiff; and it was alleged that in hostility to the plaintiff's interest he improperly used his official position as president; and the opinion

of the court is taken up, not with any inquiry into the right of Wisner to engage in an independent competitive business, but with the details of the accounting—Wisner's right to engage in an independent competitive business was postulated in the decision in question.

The same principle underlies *Citizens Trust and Deposit Company v. Tompkins,* 54 Atl. (Md.) 617; it was held that where the by-laws of a trust company, in dealing with the duties of its president, were silent upon the subject of his duties as a receiver, and the president was appointed receiver for another corporation as an individual, he was not bound to account to his corporation for his receiver's fees, on the ground that he was paid a salary as such president; and in that case it was further held that a by-law inhibiting the acceptance of a receivership by the president without the approval of the executive committee, did not restrain him from accepting a personal appointment as receiver for a corporation; and this ruling reminds us of the observation of Mr. Justice Harlan in *Clarke v. Eaton,* 100 U. S. 149, to the effect that

> "the fact that he (Eaton, an officer of the Company) held official relations to that Company did not incapacitate him from accepting the trust set out in the deed of June 27, 1870, or from discharging the duties thereby imposed".

In a Missouri case (*Clubb v. Davidson,* 8 S. W. (Mo.) 545), the president of a packet company having failed to make a contract for his company with the Government for carrying the mails, subsequently succeeded in making such a contract in his own behalf; and in carrying out his personal contract, he employed the boats of

his company to the extent of its capacity so long as the company operated boats on that route, but employed other boats when necessary. The company passed into the hands of a receiver, and the receiver sued the president in equity, claiming that the mail contracts were in equity the contracts of the company, and that the president should be required to account for all the moneys paid under them. At the hearing, the plaintiff's bill was dismissed, and judgment entered for the defendant; and on appeal, the judgment was affirmed. In affirming the judgment, the Supreme Court, while recognizing the general doctrine relative to the duties of directors and officers of corporations, then recognized the principle for which we are contending here in the following language:

> "Davidson, as president of the packet company, having endeavored to get these mail contracts for the company, and having failed, was not forbidden for the principle above stated from making a contract in his own behalf for carrying these mails."

Another interesting case, bearing upon this topic, arose in the State of Maine; and in that case, the directors were unable to make satisfactory terms with a land owner for a right of way for a proposed change of location of the railroad track; the defendant, who was one of the directors, purchased, with his own funds, without any suggestion of his associates, what was deemed much more land than was needed by the company, and immediately thereupon made a full report of his negotiations to his associates who at once repudiated the transaction as made on the defendant's individual responsibility and not in behalf of the company, which he con-

firmed; but subsequently, the track was located and the buildings erected across and upon a portion of the land, and committees appointed to settle the land damages with the defendant agreed with him upon, and staked out, the quantity of land needed and the compensation therefor, but failed finally to adjust the matter for the reason that the defendant would only convey the use for railroad purposes and not the fee of the land; and then some 3½ years after the taking of the land, the company claimed for the first time that the defendant held all the land in trust for the company. The bill of the company which prayed for a conveyance of the whole land to the company, upon its payment of the consideration paid by the defendant with interest and expenses, was held not sustainable by the court below; and in affirming this judgment, the Supreme Court used the following significant language:

> "Without questioning the rule so clearly recognized in this court (E. & N. A. R. Co. v. Poor, 59 Maine 277), as well as in many others, that his directorship constituted the defendant, in law, an agent, and in equity a quasi trustee at least, and thereby established his fiduciary character; fully appreciating the foundation of the important doctrine by which equity requires that the confidence imposed in a trustee shall not be abused for his personal interests; keeping constantly in mind the jealousy with which courts scan the dealings of a trustee with respect to matters involved in the trust; holding with other courts that the cestui que trust's right of avoidance does not necessarily depend upon the fraud or bona fides of the trustee (Duncomb v. N. Y. H. & N. R. R. Co., 84 N. Y. 199) still we are of opinion that none of the cases or the principles announced therein invoked by the complainant nor any of the numerous others upon the subject which we have carefully examined would warrant us in granting the prayer of the complainant.

"The defendant zealously worked for the interests of his principal by seeking to change the location so as thereby to accommodate the business interests of the community in which one of its intermediate stations was to be located. This result had failed to be brought about by the other directors. As a last resort he personally purchased what was then considered two or three times more land than he deemed the needs of the road required for public use, not as a speculation from which he might derive secret profits (Thomp. Liab. Off. 360, Sec. 8 and cases in notes) but to facilitate the desired object. He did not deal with the company's funds, but paid his own without any assurance or intimation that the company would ever take any of the land. He did not deal with the company's property. He did nothing which he concealed from its knowledge, but frankly and promptly disclosed the whole transaction and put his deed upon the public registry, and his acts were repudiated. He did no act in the premises in anywise inconsistent with the interests of his cestui que trust, nor acquired for himself any interest adverse to his company in any sense contemplated by the rules of equity governing trustees and cestuis que trustent."

Railroad Co. v. Stubbs, 77 Maine 594, 600-601.

Why should not a stockholder or director of a corporation be free to deal, on his individual account, with a third person who declined to deal with the corporation itself? We know from the testimony of Mr. Cleveland what the financial standing of the Presidio Mining Company was in his judgment during the winter of 1912-13; we know that this director of the Marfa National Bank plainly declared that he would not, at that time, have loaned any money to the company without additional security; and the condition of the company at that time was such that it is unreasonable to suppose that it could have escaped the attention of those holding stock in the Silver Hill Company. If the

stockholders of the Silver Hill Company entertained the same views concerning the financial standing of the Presidio Company as Mr. Cleveland did, and there is nothing here to show that they did not, one can well understand why they should be willing to deal with Mr. William S. Noyes, but unwilling to deal with a corporation in the deplorable situation of the Presidio Mining Company. But if the Silver Hill people declined to deal with the Presidio Mining Company, and we have no assurance from the complainant that they would have dealt with that company, why should not a stockholder or director of the Presidio Mining Company be at liberty to deal with them so long as his dealings with them operated no legal detriment to the Presidio Mining Company, nor took from that company any right, benefit or privilege to which it was otherwise entitled? As illustrative of this aspect of the matter, we call attention to a recent Florida case. It appeared in that case that the defendant was a director of the complainant corporation, and that while entrusted with the control and care of the business interests of the complainant he obtained a renewal of a lease of certain premises then occupied by the complainant, and claimed to hold the renewed lease as his individual property and refused, upon request, to assign it to the complainant. In the court below an order was entered dismissing the bill, and on appeal, the decree below was affirmed. The court found no fault with the general principle urged by the complainant, but pointed out that the landlord of the premises in question had declined to lease to the corporation, preferring to lease to the defendant, and

that the court had no power to compel the landlord to accept the corporation as its tenant against his will. And it being absurd to suppose that in a restricted and isolated community such as that in which the activities of the Presidio Mining Company were exercised, the deplorable condition of the latter company at the time when Mr. Noyes acquired Section 5, was unknown to the holders of the Silver Hill Company's stock, we think it contrary to the ordinary and usual course of business that the holders of that stock should prefer to deal with this moribund corporation rather than with the active and progressive individual Mr. Noyes; and since all inferences should be drawn, and all doubts resolved against the complainant, who is the actor in this proceeding, we submit that he has failed to show that under any circumstances the holders of the Silver Hill Company's stock would have dealt with the Presidio Mining Company. In a word, there is no proof here that the Silver Hill Company stockholders would have dealt with the Presidio Mining Company; the sale of their stock was a cash transaction, and the Presidio Mining Company had neither cash nor credit; and the view of Mr. Cleveland merely reflected the general opinion of the community as to the financial condition of the company at that time.

Jacksonville Cigar Co. v. Dozier, 43 So. (Fla.) 523.

The question with which we are dealing arose in New York, and was adverted to in the frequently cited case of *Murray v. Vanderbilt,* 39 Barb. 140; and in that case the court said:

"3d. The subsequent agreements made in June, 1857, and in July, 1858, were of course of the same character, and intended for the individual benefit of the defendant, and not for the use of the company. The means, condition and prospects of the company having at those times become in a much worse condition than previously, and any prospect that might have been before entertained of its restoration having utterly failed, the defendant had been authorized by a resolution of the board to sell all of the steamers of the company for the purpose of paying their indebtedness. The question then arises whether the defendant bore such a relation to the Transit Company at this time as prevented him from making this agreement for his own benefit, and whether any rule of law exists, by which he can be compelled to account to the company for the moneys received by him under this agreement. The defendant had been the agent of the Transit Company previous to the 1st of June, 1856, under a resolution passed 3d January, 1856. This agency, by the resolution and by the agreement between the defendant and the company, terminated at that time, and there is no evidence to show its renewal. He had become a large creditor of the company by advances, and had liens on all the vessels of the company as security for part of such advances and for bonds issued by the company, which he owned. The relation he bore to the company was that of president and a creditor—and the question is whether there was existing as between him and the company the relation of trustee and cestui que trust, which rendered it improper for him to make such an agreement for his own use. I do not deem it necessary to discuss the question whether the defendant, being president of a company having the means and the power and authority to run steamers on such a route, could make a contract to lay up such steamers and take to himself a compensation for so doing. I think it must be conceded that he could not, and that such a contract would be for the benefit of the company and not of the president. But when the company had virtually ceased to exist, when, at any rate for all purposes of business, and for promoting the object of the charter as originally granted, all its powers had been taken away, its property all expended and the company hopelessly

insolvent, I have not been able to adopt the conclusion that any such rule can be applied, more especially as the agreement imposed no duty or restraint on the company. The vast number of cases to which the counsel of the plaintiff has referred are cases where the agent or trustee has taken to his own benefit the property of the cestui que trust, or has done some act which the cestui que trust through him could have done for his benefit and advantage or has used the property of the *cestui que trust* for purposes resulting in benefit to himself which might have resulted in like benefit to the person for whom he was acting. This is not the present case. The property of the company was not used; the company in fact had no existence for such a purpose, and the rule in regard to a misapplication of the property or rights of the *cestui que trust* cannot apply to this case. In addition to this, the agreement imposed no duty or obligation on the company, nor was it put under any restraint thereby. The company could have run a line the next day if it had the power and means, as fully as it could the day before the agreement was made. In order to apply this rule to the present case, we must extend it so far as to say that the defendant was prevented by his relations to the company from running any steamers to the isthmus while that relation to the company existed, and that, even after the company had lost the ability to provide vessels and run them on the account of the company. I do not understand the relation of principal and agent or of trustee and cestui que trust involving any such obligation. The law protects the party against the agent or trustee in the use of its property and rights, but not beyond them, and does not prevent the performance of acts which could not result in damage to the principal, or which could not conflict with the interests of the company. The being president of an insolvent corporation cannot prevent him from doing what that company had lost all ability to do, even if its existence continued. Where the company has virtually ceased to exist, and its powers have been taken away, I think the reason and policy of the rule ceases also—because no duty rested upon the agent to run the line for the company after the authority and ability of the company to do so had terminated. The case of Abbott v. American Hard Rubber Co., (33 Barb.,

578), and the Cumberland Coal Co. v. Sherman, (30 id., 553), were cases involving the sale of the property of the corporation; but even that rule is modified in the case of an officer, who is also a creditor, and acts for his own protection. (Smith v. Lansing, 22 N. Y. Rep. 526.)

"It may well be doubted whether the terms of this agreement were at all within the bounds of the agency. The object of the charter of the company was to run vessels to the isthmus and back, not to make money by agreeing not to run. The duties of the president were only in furtherance of the objects of the charter. An agreement on his part not to run a line himself would have been to the benefit not the injury of the company if they had the means and power to continue their own line. The agreement on his part not to run was no violation of those duties, and no interference with or violation of the rights of the company. They were not affected by it. They had no restraint upon them by which they were prevented from running the line if they were able to do so. If it had been shown that in consequence of this agreement the defendant prevented the steamers of the company from running, another claim might have perhaps arisen out of that misfeasance. But there is no ground for that charge. On the contrary, as has before been remarked, the company were utterly without means to run the line, and so unable to pay the claims against them, that they had on June 2, 1856, obtained the consent of the defendant to purchase some of the vessels advertised to be sold to pay Morgan & Hoyt, and on the 12th of June had placed the possession of all their steamers with the defendant as security, and on 2d of August had mortgaged to him all their coal, coal hulks, &c., on the Pacific as security for advances, and gave him possession thereof; and in November, 1856, they authorized the defendant to sell all of the steamers of the company and apply the proceeds to the payment of their debts. I think there can be no doubt that after the 12th of June the company was unable to carry on its business; that its powers had ceased, and that the agreement afterwards made by Vanderbilt with the Pacific Steamship Company in no way infringed the rights or interfered with the interests of the Transit Company,

> and in no way violated the duty he owed to that company as the president thereof. I conclude therefore that he is not liable to account to the receiver for any moneys received by him from the Pacific Mail Steamship Company on account of the subsidy under the agreements made by him after the 12th of June, 1856."

In *Mobile, etc. Co. v. Owen,* 25 So. (Ala.) 612, the action was brought by the assignee of Mr. Owen to recover an amount alleged to be due as salary for services rendered as secretary and treasurer of the railroad company; there was a judgment for the plaintiff, and upon appeal, this judgment was affirmed. Error was assigned in the sustaining of a demurrer to a special plea; and the theory upon which this plea was constructed proceeded upon the hypothesis that when Mr. Owen accepted the office of secretary of the defendant company and entered upon the discharge of his duties as such, that debarred him from accepting and discharging the duties of secretary of another company without the consent of the defendant. There was no term in Mr. Owen's contract whereby he bound himself not to accept the office of secretary of another company; and the Supreme Court disposed of the assignment of error by remarking that

> "we know of no rule of law or public policy which inhibited him (Owen) from filling both offices at the same time, so long as the duties required of him as secretary of the other company were not inconsistent with his employment by the defendant, or involved the doing of no act prejudicial to its interests".

And it may be added that the fact that a party is a stockholder in a rival concern also, furnishes no reason why he should be denied an inspection of the books of

his own company; this view was taken in *Cobb v. Lagarde,* 30 So. (Ala.) 326, 328; and the views of the Supreme Court of Alabama were followed and approved by the Supreme Court of Pennsylvania in *Kuhback v. Irving Cut Glass Co.,* 69 Atl. (Pa.) 981, 983; and in connection with these cases, see *State v. Lazarus,* 105 S. W. (Mo.) 780, 783.

3. **The claim that Mr. Noyes should have made the purchase of Section 5 for the Presidio Mining Company by personally advancing the funds needed for that purpose, or by pledging his individual credit at his individual risk, is fully answered by the proposition that to hold that even an officer or director of a corporation—neither of which Mr. Noyes was,—is under any duty to such corporation to loan it money, or to purchase property for its use out of his private funds, or by the exercise of his personal credit, would be to enlarge the duty of an officer or director of a corporation beyond any point to which the law of corporate obligation, whether statutory or otherwise, has ever gone; such a claim is "altogether untenable, both legally and financially." (Teller v. Tonopah Ry., 155 Fed. 482, 483-4)**

In approaching the consideration of this proposition, it may be of interest to ascertain just what Mr. Noyes' position was in the economy of this company at the time when he acquired Section 5. At the time in question, Mr. Noyes did not fill any office which was of the essence of the corporation. The distinction seems to be recognized in the books between corporate officers whose offices are of the essence of the corporation, and those persons whose activity is not of the essence of the corporation; and courts of equity regard the former class as *quasi* trustees, but do not so regard the latter class (see for some examples of this, *U. R. R. v. Dull,* 124 U. S.

173—Company Engineer; *Palmer v. Cypress Hill Cemetery,* 25 N. E. (N. Y.) 983—Superintendent; *Hitt v. Sterling Gould,* 82 N. W. (Iowa) 919—Secretary; *Garretson v. Pacific Crude Oil Co.,* 146 Cal. 184—Secretary).

At the time in question, Mr. Noyes did not have direction of the affairs of this company, nor was he in a position where he could direct those affairs; he was not a director of the company; he was not in charge of its books or records; most of his time was spent away from the office of the company; and his activity was limited to the actual mining operations. He was in charge of the mine itself as the mining superintendent; no such post was provided for in the by-laws of the company; and when, later, the title of the post was changed, the fact remained unchanged (651-2); and it was the understanding of the parties to this action that Mr. Noyes was, to quote the language of the pleadings upon both sides, a "salaried employee" (amended bill, paragraph 14, page 57; answer, par. 14, page 114). There is no proof in the record that Mr. Noyes had any other powers conferred upon him beyond those which may be implied in the designation of "superintendent"; he was empowered to employ and discharge persons at the mine, but, as we shall see, a necessary feature of this character is very common to such posts as that of a superintendent; and while he was authorized at times to borrow money, yet, as we shall see, he had no inherent power to do so, and it was necessary that he should be so authorized by the board of directors—that the superintendent of a mining property has no power to borrow money even for the purpose of carrying on the mine,

was directly held in *Union Gold Mining Company v. Rocky Mountain National Bank,* 1 Colorado 531. Judge Thompson, the author of Commentaries on the Law of Corporations, speaking of this post of superintendent, says that:

> "This officer or agent has no power which is defined in law, but the implications as to his power are left to be derived from the facts in each particular case. The general superintendent of a railroad company may fairly be presumed to have the power to bind the company by contracts relative to the safe and effective operation of the road, such as a contract to fence its tracks. The superintendent of iron works whose authority, *as stated in the by-laws of the corporation,* was 'to have charge of the manufacturing department of the works, audit bills for materials and labor, and to appoint and discharge foremen and workmen' had no authority to receive a loan of money in the name of the company, and in consideration thereof to execute and contract in its name for the sale of a quantity of iron. Similarly, it has been decided that the superintendent of a mine, with authority to take ore therefrom and crush it, for the purpose of obtaining gold, cannot, upon such authority, borrow money in the name of his principal for the purpose of carrying on the mine."
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> *10 Cyc.* 932.

Such a superintendent, especially where as here no provision is made for him in the by-laws of the corporation, is not really an officer whose office is of the essence of the corporation; he is the creature of the directors (*Louisville Ry. v. Wilson,* 138 U. S. 505; *Vardeman v. Penn., M. L. I. Co.,* 125 Ga. 117; *State v. Grymes,* 65 West Virginia, 451; *Patten v. Board of Health,* 127 Cal. 388). Such a superintendent has no authority to make notes or contract debts in the name of the company (*Carpenter v. Biggs,* 46 Cal. 91; *Benedict v. Lansing,*

5 Denio 283; *Conqueror Mining Co. v. Ashton,* 90 Pac. (Colo.) 1124; *Alton Mfg. Co. v. Garrett Inst.,* 90 N. E. (Ill.) 704; *Underwood v. Germania L. I. Co.,* 67 S. E. (Ga.) 587). The complainants in this cause affect to fancy some occult wrong in such a superintendent being vested with authority to employ and discharge subordinates, but there is nothing unusual, extraordinary or improper in this (*10 Cyc.* 933; *Preston v. Central etc. Co.,* 11 Cal. App. 190; *Dollar v. International Banking Corporation,* 13 id. 331; *Forked Deer Co. v. Shipley,* 80 S. W. (Ky.) 476; *Fiske Co. v. Reed,* 77 Pac. (Colo.) 240; *Cozzens Co. v. Western Co.,* 112 Ill. App. 309; *Kelly v. Jersey City,* 67 Atl. (N. J.) 108, including the fixing of wages).

The directors are not sureties for such a superintendent (*Briggs v. Spalding,* 141 U. S. 132; *Warner v. Penoyer,* 91 Fed. 587; *Savings Bank v. Caperton,* 8 S. W. (Ky.) 885; *Swentzel v. Penn. Bank,* 23 Atl. (Pa.) 405; *Wallace v. Lincoln Savings Bank,* 15 S. W. (Tenn.) 448). He could be discharged at any time by mere agreement of the directors, without any formal resolution (*Mobile Ry. v. Hawkins,* 51 So. (Ala.) 37); he cannot waive contract provisions (*Farmers Co. v. Pawnee Co.,* 107 Pac. (Colo.) 286; *Worthington v. Mack Co.,* 175 Fed. 763); and Mr. Noyes, as such superintendent, would have no implied power to purchase another business for the Presidio Mining Company although of the same kind as that operated by the Presidio Mining Company (*Manhattan Liquor Co. v. Magnus & Co.,* 94 S. W. (Tex.) 1117); and certainly this record makes it clear that he was given by the Presidio Mining Company no

express power to do so. As such superintendent, Mr. Noyes was neither a majority stockholder, nor a director, nor a fiduciary; but even if he were, that would not prohibit his individual acquisition of a property that the company had no interest in or relation to—a property that it had neither the intention nor the ability to purchase, and a property the purchase of which it had refused, though presented with the opportunity. Mr. Noyes, though superintendent, was but a stockholder and not a majority stockholder; he was not even so far forth a fiduciary in the sense in which that abused term is often loosely applied to a director; he could deal even with his own corporation as a stranger and at arm's length; what was there, then, to prevent his dealing with a stranger, the Silver Hill Company, as to a parcel of realty that the Presidio Mining Company had no interest in, or plans about, and was itself helpless to purchase? Obviously, the position of Mr. Noyes at the time of that purchase, the situation of the company at that time, and the relations, such as they were, between him and the company, were not such that any duty, obligation or trust rested upon him, requiring him either to purchase Section 5 for the company, or to refrain from purchasing it for himself; not only was the Presidio Mining Company without "the better right" to Section 5, but it had no "right" of any character to the section *(Stark v. Starrs,* 6 Wall. 419; *Meader v. Norton,* 11 id. 458); and after he did acquire the Section, he did not operate it in independent opposition to, or competition with, the Presidio Mining Company.

Under what provision of what statute, according to what principle of equity, pursuant to what doctrine, can it be claimed that any duty, obligation or trust rested upon Mr. Noyes to pledge his individual credit, or risk his individual resources, to acquire this Section for the Presidio Mining Company rather than for himself? This inquiry, we submit, is not to be answered by glittering generalities, dogmatically asseverated; we insist that Mr. Noyes was not required by any rule to do that thing; we insist that the contrary contention is "altogether untenable, both legally and financially" *(Teller v. Tonopah Ry.,* 155 Fed. 482, 483-4); and we challenge the production of a single responsible authority which supports the view against which we protest. And plainly, if a stockholder should decide to imperil his personal credit, or individual resources, upon what theory could the gratuitous beneficiary presume to dictate either objects or terms? Would it not be for the stockholder himself, in the case supposed, to determine the objects for which, and the conditions under which, he would voluntarily do an act which he was not compellable to do? If his object were disapproved, or his terms rejected, by the corporation which otherwise would have been the recipient of his gratuity, pursuant to what rule could that corporation nevertheless compel him to bestow that gratuity? If Mr. Noyes could not have indemnified himself for the use of his personal credit in a transaction that later was the source of benefit to the Presidio Mining Company, and therefore had refrained from doing that which no law required him to do, the corporation would inevitably

have collapsed, and this litigation would not be consuming the time of the courts. Certainly, no other stockholder, no person standing behind a stockholder as Mills stood behind Overton, contributed or offered to contribute, a single dollar's worth of capital, aid or energy, to effect the one thing that became the salvation of the very company that the backsliders now seek to rule or to ruin. As observed by the Supreme Court:

> "Can it be that, if at any time in the history of a corporation engaged in business, the market value of its property is in fact less than the amount of its indebtedness, the directors, no matter what they believe as to such value, or what their expectations as to the success of the business, act at their own peril in taking to themselves indemnity for the further use of their credit in behalf of the corporation? Is it a duty resting upon them to immediately stop business and close up the affairs of the corporation? Surely, a doctrine like that would stand in the way of the development of almost any new enterprise. It is a familiar fact that in the early days of any manufacturing establishment, and before its business has become fully developed, the value of the plant is less than the amount of money which it has cost, and if the directors cannot indemnify themselves for the continued use of their personal credit for the benefit of the corporation, many such enterprises must stop at their very beginning."
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> *Sanford Fork Tool Co. v. Howe Brown & Co.*, 157 U. S. 312, 319.

And where the conditions are such that the employment of the credit of a stockholder, whether director or not, becomes necessary to the salvation of the corporation, what difference can it make, so far as this principle of indemnity is concerned, whether the corporation is just beginning its life, or about, save for the use of the credit, to terminate its existence?

The purchase of Section 5 was a cash purchase, Mr. Noyes obtaining the cash upon his personal notes; but what principle of equity can justify the claim that in making this purchase from the stranger, the Silver Hill Company, of a parcel of realty in which the Presidio Mining Company had no legal or equitable interest whatever, and which it had neither the intention nor the financial ability to purchase, Mr. Noyes should have borrowed, on his own notes, that money, not for himself, but for this tottering company, then actually staggering under an overdraft? Mr. Noyes borrowed this money upon his own credit; the company had no credit; it had paid no dividends for seven years; it was in debt; a national bank director testified, and his testimony was not assailed, that

> "in 1912, and in the early part of 1913, I would not have loaned the Presidio Mining Company any money without additional security"; (904)

no person appeared who was ready to give any credit to this company; according to what rule was the man, who had credit, required to borrow this money upon his personal responsibility, and then hand it over to a company that was stripped of credit and responsibility? Wherein lies the equity of such a performance as that? Since when has it been the law that stockholders are obliged to employ their individual pecuniary means or credit for the benefit of a corporation? We do not understand that any such duty rests upon any stockholder; as remarked in *Kelly v. Fahrney,* 145 Ill. App. 80, 96, affirmed 89 N. E. 984:

> "While such are the duty and obligations of officers, directors and stockholders, there is no duty on their part

> to use individual pecuniary means to assist the corporation in its money difficulties, or by the use of such means to shield it from financial destruction'';

and as remarked in *Teller v. Tonopah Ry.,* 155 Fed. 482, where it was held that the circumstance that directors of a corporation are personally interested in a contract made with the company and are to a certain extent to profit by it, does not necessarily condemn the transaction, the court remarked:

> ''The complainant is even inclined to think that if for any reason it (the company) could not raise the money on its own obligations, the directors who are men of large means should have got it for the company on their personal credit. These are somewhat novel ideas—some of them—but they are not necessarily to be rejected upon that ground. Upon examination, however, they will be found to be altogether untenable, both legally and financially. It is not necessary to take much time over the suggestion that there was any duty on the part of the directors to raise money for the Company personally. There might be exigencies when they would see fit to do so, but they were not bound to.''

This company was a Californian corporation; the liability of the stockholder, Mr. Noyes, for its obligations, was fixed by law; what rule, statute, decision or doctrine impressed upon him, rather than upon any other stockholder, any duty to borrow money for this company upon his personal credit? This company could not raise the money for the purchase of Section 5; it had neither the money nor the credit; where, then, were the other stockholders? Where were the transferees of Mills? And where was this complainant? Mr. Noyes never at any time declared that he could borrow for the company for the purchase of Section 5; the farthest that he

ever went was to say that he could borrow for the improvements on Section 8 (537-8); and any attempted reproduction of his language which seeks to suggest any declaration by him of his ability to borrow money for this company for the acquisition by it of Section 5 would be a wholly indefensible distortion. And it may be added that not only did no duty rest on Mr. Noyes to risk his personal funds and individual credit to purchase this section for this company, but the company then had, and could have had in its then condition, no plans whatever as to Section 5 which Mr. Noyes could in any way have interfered with or even assisted.

Union Trust Co. v. Carter, 139 Fed. 717, 729.

4. Section 5 was not immune from the characteristic conjecturalities of mining, and especially of pocket deposits.

Section 5 was and is fully as problematic in its character as any other piece of mining ground; the proof shows that it shared all of the uncertainties that are so constantly encountered in the history of mining; at the time of the purchase by Mr. Noyes, he had no real assurance that his venture would be successful, and whether the section would turn out to be a success or failure was highly dubious; and the subsequent history of this mining company is one of uncertainties and fluctuations. As a mining engineer, Noyes could not very well have failed to realize that the future of Section 5 was, like so much in the history of mining, a hope and an expectation. And that this is true of mining property in general is recognized by the Supreme Court:

> "There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A

> location which today may have no saleable value may in a month be worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."
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> *Patterson v. Hewitt,* 195 U. S. 309, 321.

Mr. Noyes took the risk. If, as is not uncommon in mining ventures, this venture had developed into a failure, would those who resisted assessment, who looked with cold eyes upon the cyanide installation, and who never by word or act assisted in the acquisition of the Silver Hill stock, have contributed to make good any loss which Mr. Noyes might have sustained? It was said by Mr. Justice Potter in a Rhode Island case *(Green v. Harris,* 11 R. I. 5), that "human nature constitutes a part of the evidence in every case"; and in one of those innumerable corporation cases which occupy our courts it was said by Mr. Justice Brewer, in delivering the opinion in the *Louisville Ry.* case, 174 U. S. 688, "human nature is something whose action can never be ignored in the courts"; and if one may judge of what a man is likely to do, by a consideration of his past performances—if there be such a fact in human nature as "running true to form",—then, obviously, it was not in the human nature of these delinquents suddenly to reverse their antecedent attitude and generously to come forward with aid and assistance; on the contrary, they would have been swift to remind Mr. Noyes that the speculation was his, that he should bear

the loss, and that he should saddle no part of it upon them. And when Mr. Noyes did acquire this uncertain quantity, "he did not deal with the company's funds, but paid his own without any assurance or intimation that the company would ever take any of the lands" *(Sandy River Ry. v. Stubbs,* 77 Maine, 594, 601); how was he, indeed, to foreknow that he could secure any money from this bankrupt company? He knew that its experience had been varied, dividend-producing during its earlier history, but the reverse during later years; he knew of the shut-down of December, 1907; he knew of the Lewisohn rejection; during his negotiations he learned of the treasury having been depleted by Osborn's peculations; what foundation had he, upon acquiring Section 5, for any expectation that he would recoup the purchase price of that section from this company? But if the expectation were realized, where was the wrong; and if that expectation were realized through the operation of a series of facts working a benefit instead of a detriment to this company, where was the wrong? Why was not Mr. Noyes to expect the natural? If a director acquired a piece of realty and then leased it to his company upon fair terms, why is he not to expect to secure his rental from the lessee? But the fact remains that when Mr. Noyes acquired Section 5, the property, viewed as a mining property, was a symbol of uncertainty; and if he entertained any expectation then of obtaining from the company through leases or otherwise the amount which he had invested, that expectation likewise shared the uncertainty and conjecturality which was so typical of Section 5 itself.

5. **In his dealings with this company relative to Section 5, no rule of equity prohibited Mr. Noyes from making a profit fair under all the circumstances.**

Since no duty whatever rested upon Mr. Noyes to employ his private funds or pledge his personal credit in order to acquire Section 5 for this company, then, since he did so while others either refused to assist, or persisted in a crass indifference to the affairs of the company, it was for him to determine the objects for which, and the conditions under which, he would voluntarily do an act that he was not legally, equitably, or morally compellable to do; it was neither the money nor the credit of the Presidio Mining Company that acquired the Silver Hill stock, but it was the ability and energy and the money and credit of William S. Noyes which effected that purpose; and since there is neither fraud nor inequity in a man making with another a fairly advantageous contract as to property acquired by him with his own means, it must be plain that the accrual of a profit that is fair under all circumstances operates no impeachment of the validity of the contract—if there were no profit to be obtained, the contract would rightly be declined. If Section 5 became legally the property of Mr. Noyes, then he had the obvious legal right to enter into contracts concerning it, whether with the Presidio Mining Company or with any other party; and if he entered into such a contract, he had the legal right to make the best bargain he could, and to insist that the terms of the bargain should be lived up to. It is not the law that, even when a director contracts with his own company, he must, in order to avoid the imputation of fraud, con-

tract at a loss to himself *(Seymour v. Spring Forest Cem. Assn.,* 39 N. E. (N. Y.) 365); if he could not contract at a profit, he would not contract at all; if he would not contract, there might be no one else who would; and if he may contract at a profit, how can such a profit be treated as a badge of fraud *(10 Cyc.* 794; *Griffith v. Blackwater Co.,* 48 S. E. (W. V.) 442; *Wabash v. Guelden,* 90 N. W. (Mich.) 406? But no reasonable man, familiar with business tranactions, would infer that because I have made the best bargain I could with reference to my own property, therefore that bargain is an inequitable or fraudulent bargain; on the contrary, in the absence of positive and convincing evidence of fraud, the courts do not impeach grown mens' bargains upon mere suspicion or guesswork. What, then, is there in the law to prohibit Mr. Noyes from making a fair profit in his dealings with this company in respect to a section which this bankrupt corporation never intended to purchase, and could not have purchased, even if it had entertained the intention to do so? Was he not, due consideration being given to all of the surrounding circumstances, "entitled to dispose of the property to the best advantage" *(Sioux City Ry. v. Manhattan Trust Co.,* 92 Fed. 428, 432 *ad finem)?* What was there to prohibit him from dealing with his own company, and that too at arm's length, precisely like any other stockholder in this or in any other corporation? Why should some newly developed, special and hitherto unrecognized disability be thrust upon Mr. Noyes—a disability not shared by stockholders in any other company? Is equity still to be determined

by the length of the *Chancellor's* foot, or by the vociferations of disgruntled minority stockholders, breathless to "control the management" (letter, Overton to Gleim, 623-4), or is it that system of fixed principles recognized by Pomeroy and the federal courts—does equity act at haphazard or according to an established system of principles *(Pomeroy, Eq. Jur.,* Sec. 59; *McElroy v. Matterson,* 156 Fed. 36, 42; *Wright v. Ellison,* 1 Wall. 22; *Rees v. Watertown,* 19 id., 107; *Hidges v. Dickson,* 150 U. S. 192)?

And since Mr. Noyes supplied the capital which permitted the acquisition of the Silver Hill stock, since in his dealings with the company, as to Section 5, he was entitled to a profit that, under all the circumstances, would be reasonable, just and equitable, both to him and to the company, since he supplied the ore while the company supplied the plant for extraction, it is submitted that there is nothing in the nature of an equal division of the net which impairs the fairness of the agreement of November 19, 1913. In many departments of human activity, it is recognized that equality is equity; we see it exemplified in partnership and other relations; we see it exemplified in the rule that, in case of a grant to two persons without designating which share each takes, they are presumed to take in equal proportions *(Treadwell v. Bulkley,* 4 A. D. 225; *Henderson v. Womack,* 41 N. C. 437; *Appeal of Young,* 83 Pa. St. 59); we see it exemplified in distinctive doctrines of equity jurisprudence *(Pom. Eq. Jur.,* 405); and surely if there ever was a relation which justified the application of the principle that equality is equity—

which demanded its application—it was the relation that obtained between this corporation, hastening to its destruction, and the man whose capital, credit and energy arrested that fatal progress.

6. Although no obligation rests upon a stockholder or director to make disclosure of his private transactions disconnected from his company, yet there was no secrecy connected with Mr. Noyes' acquisition of Section 5.

There was much ado about the asserted secrecy of the acquisition by Mr. Noyes of Section 5; but it was much ado about nothing; there was no secrecy about the transaction, it was entirely open and unconcealed, and it was given general publicity among the stockholders; and after two years' delay or more, the solitary stockholder who emitted a moan was Overton,—the other complainant being but a diaphanous ghost in the controversy and of importance equivalent to that of the dimmest of spectres.

As we have seen, there is nothing in the law which prohibits a stockholder or director from engaging in private and individual transactions disconnected from his corporation, nor does any rule of law prohibit an individual profit from being made in such individual transactions. But if a stockholder or director should engage in such a transaction, what statute, rule or decision can be produced which imposes upon him any obligation to expose his private affairs to the inspection of anybody, whether company stockholder, company director or what not? If a stockholder or director should purchase a parcel of realty, by what law is he

required to announce either the intention or the consummated fact to anybody? Because a man becomes a stockholder or director, are his privacies any more open to invasion than those of any other citizen? It must, we submit, be constantly borne in mind that at the time of the acquisition of Section 5 by Mr. Noyes, the Presidio Mining Company was wholly without any right, title or interest in Section 5; that the case made here is not analogous to that class of cases where a director of a railway corporation, for example, knowing that *the projected route* of the company will pass through certain towns, and that certain terminals will be established in such towns, secretly purchases those terminals, for the purpose thereafter of making an undue profit upon the sale of such terminals to the company which needs them in the transaction of its railway business; and it must never be lost sight of that throughout this entire period of time, the Presidio Mining Company had no antecedent plan or plans relative to the user of Section 5, and was in no financial position to have entertained any such plan or plans, even if it had desired so to do; and that, with the establishment of the cyanide plant, which rendered available the low grade ores from Section 8, Section 5 was really not essentially necessary to the continued activity of the company. In a word, the purchase by Mr. Noyes of Section 5 was a transaction which was disconnected from the company,—to paraphrase the language of *Lagarde v. Anniston Lumber Co.*, 28 So. (Ala.) 199, 201-2, "proprietorship of Section 5 may have been important to the corporation, but it is not shown to be necessary to the continuance of its business".

But, in the cause at bar, Mr. Noyes made no concealment of any sort concerning Section 5. The record establishes, and without a particle of contradiction, that he discussed that matter quite openly with the principal stockholders of the Presidio Mining Company, and that he made no suppression of his intentions from other persons as well, such as the bank officers in Texas, and others; he was quite free to state his intentions in that regard to any person who might choose to inquire into them; not a single instance is presented in this record in which Mr. Noyes deprecated or avoided any inquiry into his purposes as to Section 5; and none of those features of affirmative concealment which reappear in many of the decided cases, characterized Mr. Noyes' conduct; and immediately upon acquiring the majority interest in the Silver Hill Company, he gave full expression to the facts in the annual report of 1913, which report was distributed among the stockholders, was familiar to this complainant, was produced on the hearing from his possession, and was marked in the case as his exhibit 17. No transaction with this history can fairly be said to be concealed; no transaction can be said, we submit, to be concealed where open disclosure is made, not only in direct communication to those principally interested, but also in the records of the company itself; and a suitable analogy may be perceived in the remark made in *Calivada Colonization Co. v. Hays,* 119 Fed. 202, 207, *ad finem,* to the effect that "the transaction was not concealed, but was disclosed by the minute book and stock books of the company". For in the instant cause, not only was disclosure made directly to

the people principally interested, not only was disclosure made promptly in the annual report of 1913, but no person can read the minutes of the meeting of January 29, 1913, and the fifty cent lease of January 25, 1913, therein referred to, or the minutes of the meeting of February 15, 1913, and the resolution then adopted, or the minutes of the meeting of November 19, 1913, or the contract then entered into, without understanding fully the whole situation, and Mr. Noyes' relation to Section 5.

It is alleged in the amended bill that the complainants are non-residents; but, so far as non-resident stockholders are concerned, under what obligation was Mr. Noyes, the individual purchaser, personally to notify them either as to his intention to purchase Section 5 or as to the consummated fact? The company, proper conditions being given, might under appropriate statutes be required to make reports of its own transactions; but what statute required the individual, Mr. Noyes, to report to these non-residents his private transactions with such strangers as the Silver Hill Company? We submit that neither upon the corporation nor upon Mr. Noyes did there rest any duty to make extra-territorial excursions for the purpose of conveying books and/or records to non-residents for their inspection; that when the statute of the domicile of the corporation was complied with as to the keeping of books and records, the whole duty of the corporation was accomplished; and that if stockholders preferred to live elsewhere, no obligation rested upon the corporation to carry books, papers, records or information out of the State to them, but the obligation rested upon them to come to the cor-

poration. It cannot be disputed that every corporation is a resident of the State of its creation, and although it may be permitted to transact business where its charter does not operate, it cannot, on that account, acquire a residence there *(Germania Fire Ins. Co. v. Francis,* 11 Wall. 210; *B. & O. Ry. v. Koontz,* 104 U. S. 5; *Taylor v. Holmes,* 14 Fed. 498; 127 U. S. 489; *Fales v. Chicago Ry.,* 32 id. 673; *O'Brien v. Big Casino Mining Co.,* 9 Cal. App. 283); and that the domicile of the corporation is where its principal office, books and records are kept *(Galveston Ry. v. Gonzales,* 151 U. S. 504). Not only can there be no indiscriminate shifting of the principal office *(Frick v. Norfolk Co.,* 86 Fed. 725), but the general doctrine requires that the books and records shall be kept within the State of incorporation *(State v. Park Lumber Co.,* 58 Minn. 330; *Simmons v. N. & B. Steamboat Co.,* 113 N. C. 147), and there is no power in the board of directors to remove the books and records beyond the State *(McConnell v. Combination Mining Co.,* 76 Pac. (Mont.) 194). There is no departure from this general doctrine in the law of California. It appears from the pleadings that the Presidio Mining Company is a California corporation; and according to the Constitution of the State (Article 12, Sec. 14), and according to the provisions of the California Civil Code (Sections 377, 378), the principal office of the company must be maintained and the books and records retained within this State. No duty, then, rested upon this corporation to go forth into foreign states in quest of non-residents; but, if the non-residents desired information, it was their duty to come or to send to the

corporation for it. What statute or by-law, indeed, imposed in this regard any extra territorial duty upon this company, or, if it attempted to do so, could have any extra territorial force?

If, therefore, a stockholder were a non-resident, he would be taken to know that the company was not compelled to seek him out that its books and records should be submitted to his inspection; on the contrary, should he desire any particular information, it was his business to come or send to the company for it; the operations of the company could not be suspended, its activity paralyzed, or important transactions nullified, by the stoppages and delays incident to the submission of such business to such non-residents; and in the absence of some provision of law, whether of statute or by-law, in the absence of some specific agreement to that effect, no obligation required the corporation or its officers to seek out the non-resident for the purpose of notifying him of the proceedings of the corporation. As observed by Van Fleet, J., in *Von Horst v. American Hop Co.*, 177 Fed. 976, 981:

> "Nor does the averment of a want of notice to complainant of the purpose to assess the stock add anything of substance to the bill. I know of no obligation independent of one created by specific agreement, or by-law requiring notice to either a director or stockholder, absent from the country, of proceedings of a corporation to assess its stock. No such obligation is stated in the bill";

and no such obligation is stated in the bill in the instant cause or established in the proof. We submit that it cannot be said that silence is fraud where the corporate books are open to all who may choose to see, or to have

others see for them; but though the purchase of Section 5 was Mr. Noyes' individual venture, and therefore not a matter to be entered in the corporate records, still Mr. Noyes did not conceal it, reference was in fact made to it in the corporate records; if Overton did not have knowledge, it was not because the transaction was concealed from him; and Overton had the means of knowledge which is the equivalent of knowledge *(Calivada etc. Co. v. Hays,* 119 Fed. 202, 208). To require this corporation or its officers or stockholders to go abroad to submit books and papers to the inspection of non-residents, would not only be tantamount to the erection of such stockholders into virtual autocrats over the corporation, but would so impair the efficiency of the directorate that it would cease to be the governing body that it was designed to be. In *Cowell v. McMillin,* 177 Fed. 25, 39, it was recognized that so long as the agents of a corporation act honestly within the powers conferred upon them by the charter they cannot be controlled, and individual shareholders cannot dictate to them what policy they shall pursue, or impair the discretion conferred upon them by the charter; and in *Carson v. Alleghany Window Glass Company,* 189 Fed. 791, 796, it is declared that

> "when the law making power has declared that the business and affairs of a corporation, created and organized under that power, shall be directed by its Board, it ill becomes courts created for the administration of the law, unless under special and exigent circumstances, to declare that its business and affairs shall not be directed by such Board".

Under ordinary circumstances, a minority stockholder cannot object to the exercise by the majority of

their legal powers (*Metcalf v. School Furniture Co.,* 122 Fed. 115; *Dickenson v. Cons. Traction Co.,* 119 id. 871; *Taylor v. S. P. Co.,* 122 id. 147; *Cannon v. Brush Electric Co.,* 96 Md. 446); the effect of the action of the board of directors upon the fortunes of individual stockholders is to be disregarded (*Doherty v. Rice,* 184 Fed. 878; 186 id. 204); the unanimous consent of all the stockholders of a corporation is not essential to the doing in good faith of any act within its charter powers (*Sabre v. United etc. Co.,* 225 Fed. 601); and as observed in *Corbus v. Alaska Treadwell Gold Mining Company,* 187 U. S. 455, 463:

> "The directors represent all the stockholders, and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter, lawfully confided to their discretion may not lightly be challenged by any stockholder, or at his instance submitted for review to a court of equity. The directors may sometimes waive properly a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right, or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."

And see also *Wingert v. First National Bank,* 175 Fed. 739.

Not only is it "not a trifling thing for a stockholder to attempt to coerce the directors of a corporation",

to use Justice Brewer's language, whether that coercion take the shape of compelling them to carry abroad the records of the corporation, or any other shape, but where there is a duty of finding out and knowing, negligent ignorance has the same effect, in legal contemplation, as actual knowledge (*1 Thompson, Commentaries on Negligence,* Sec. 8; *F. M. Davies & Co. v. Porter,* 248 Fed. 397; *Wecker v. National Enameling Co.,* 204 U. S. 176, 185); as observed in *Wecker v. Enameling Company,* supra:

> "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one wilfully closes his eyes to information within his reach";

not only is one bound by such facts and circumstances as the exercise of due diligence would lead to the knowledge of, but where his ignorance is the result of his culpable negligence he is equally bound *(Simmons Creek Coal Co. v. Doran,* 142 U. S. 417); and since no obligation rested upon the Presidio Mining Company to ship its books and records out of the State of California, and to a foreign State like Maryland, whether to suit the convenience of a stockholder or otherwise, it follows that, if the non-resident desired information, he should procure it through an agent or attorney *(Clauson v. Clayton,* 93 Pac. (Utah) 729)—but the failure to adopt this method, at once simple and common, cannot fairly be charged against the company. So far as the resident stockholders of the Presidio Mining Company are concerned, this record fails to disclose a single instance in which any complaint was ever made of any secrecy in any transaction of the company, or by any of its officers; and the same is equally true as to all of the non-resident

stockholders with the single exception of Overton, one of the complainants. But, during the period within which Mr. Noyes acquired Section 5, Mr. Overton, if he had retained the slightest interest in the affairs of the company, could readily have obtained by simple inquiry the same information which Mr. Noyes had so freely given to the other stockholders; and published in the Annual Report of October, 1913; and there is no proof that he could not, or that he was destitute of the means of acquiring such knowledge (*Van Allen v. Francis,* 123 Cal. 474, 482); or, Mr. Overton could readily have retained counsel, or some other agent, to make any desired inquiries—to adopt the language of *Vassault v. Austin,* 32 Cal. 597, 607-8:

> "The natural course to be pursued in such a case would be either to call upon the custodian of the records * * * and inquire of him * * * or to employ some person more learned or competent than themselves to make the proper inquiries and investigations";

and compare in this behalf *U. S. v. Ames,* 99 U. S., 35, 47, and the analogies suggested by *Peacock v. U. S.,* 125 Fed. 583. But, not only did Mr. Overton wholly fail, from 1908, when he was given his stock by Mr. Mills, to 1915, when he made his visit to the International Exposition in San Francisco, to exercise any diligence whatever, to keep in touch with the company's affairs, or to inform himself as to the general situation, but although he received the annual report of 1913, which was issued to and distributed among the stockholders shortly after Mr. Noyes acquired Section 5, yet, from 1913 to 1915, he continued guilty of inexcusable laches. If he had any cause whatever for reasonable complaint,

that annual report of itself would bring Mr. Overton within the rule that where facts are brought to the attention of a party such as to awaken suspicion, or lead a man of ordinary prudence to make inquiry,—such as to excite attention and put the party on his guard,—such facts are notice of everything to which such inquiry might have led (*Shauer v. Alterton,* 151 U. S. 607). It is a matter of history that Mr. Noyes opened this matter of the acquisition of Section 5 in December, 1912, that he acquired all but four shares of the capital stock of the Silver Hill Company prior to January 25, 1913, that the matter then proceeded to its final consummation in May, 1913, and that the annual report of 1913 was issued in October, 1913; this annual report disclosed to every stockholder precisely what Mr. Noyes' dealings were in respect to Section 5; Mr. Overton received this report in due course and produced it as his exhibit during the hearing below; and yet, with the information in his posssession as to Mr. Noyes' proceedings in the matter of the acquisition of Section 5, this solitary non-resident stockholder stood by, looked on and did nothing effectual until he commenced this suit on July 26, 1915. That Mr. Overton, or his accredited agent, had immediate and instant access to the books and records of this corporation, no one can doubt; to have withheld those books and records was, under the laws of California, a crime (Penal Code, Section 565); under the general doctrine upon this topic, Overton was entitled not only to inspect these books and records, but also to take copies of them; and although those books and records were the books and records of the corporation, and not of Mr. Noyes, nevertheless they disclosed full informa-

tion relative to Section 5 and the action of Mr. Noyes and of the corporation with relation thereto. Doubtless, there is a duty on a corporation to keep records of its transactions, but there is no duty requiring a director to do so; there is no proof that references to Section 5 were suppressed from the corporate records, the contrary being the fact; and even if one were to concede that concealment amounts to fraud where there is a duty to disclose, the question would still remain as to what additional duty to disclose to Overton rested upon William S. Noyes where he had already disclosed the facts to the leading stockholders, where the annual report of 1913 fully exhibited the facts in question, and where the records themselves plainly exhibited the existing situation? We submit, therefore, that no duty required Mr. Noyes to disclose his individual transactions, disconnected from the company, to any other stockholder, whether resident or non-resident; that no duty required the company to carry abroad to non-residents any books, records or papers, and if any information was desired by a non-resident, it was his duty to come or send to the company for it,—it was not the duty of the company to take it to him. And it may be added that nowhere throughout this history, in no single particular, has any false representation concerning Section 5 been traced to Mr. Noyes; and upon the particular matter of the cost of that Section to him, it nowhere appears even that the stockholders ever inquired as to this cost; and while this was a waiver by them as to information upon that matter, still it nowhere appears that Mr. Noyes ever refused to disclose that cost,—which is a feature

of this case, making it stronger even than *Barr v. Pittsburgh Glass Works,* 51 Fed. 33, 37; 57 id. 86, 97; cited as authoritative in *Cowell v. McMillin,* 177 Fed. 25.

7. So far from any secrecy characterizing Mr. Noyes' acquisition of Section 5, the record shows without contradiction that he offered it to the company at cost; the records of the company corroborate this statement; and it was not necessary that any formal resolution should have been adopted in respect of this offer.

Upon the proposition that Mr. William S. Noyes offered Section 5 to the Presidio Mining Company at cost, the testimony is all one way, and without the slightest contradiction. In Vol. 3, page 689, of the record, Mr. William S. Noyes, after speaking of his having been in Texas, goes on to say that:

> "After my return here to San Francisco, I went to see Mrs. Willis and Miss Doherty at Mrs. Willis' apartments, and told her there was this shortage and it left me in a bad scrape and the company in a worse one; that I had bought this Section 5 with money that I had borrowed; the company had these contracts which I had assured my friends were good, and the company could have that mine at cost if they wanted it. The mine that I refer to was Section 5. Mrs. Willis, of course, was very much perturbed over this occurrence; she said she did not see how they could take it. Miss Doherty felt the same way."

And on page 691-692, Mr. Noyes further states:

> "I had several conferences with both these ladies and one with Mr. Osborn. I told them that there was ore in there we could pull the company out with, notwithstanding the bad situation. We had all of these obligations that were assumed, or agreed to be assumed, and it was too late to back out. I was out in round numbers $25,000 of my money put into Silver Hill Mine, Section 5; I had obtained credit for the company at that time of about $44,000, I think it was; and it was almost too heavy a load for me

to carry alone; that the company could take the mine any time they were able to off my hands at its cost, or if I had got to stand under all this, I thought that it was only fair that I should have some compensation for it. Mrs. Willis said she thought so, too, and Miss Doherty joined in that, and I had a talk with Mr. Osborn and he agreed to the same thing; so we agreed between us if I furnished a lease to pay me one-half of the net; and that would be a fair division; so I agreed to carry on the business on that basis."

And further along in the same volume, at page 724, the following occurred:

"Q. In regard to the conditions under which you entered into the agreement with the company in the manner that you have described, to divide the net profits 50-50, was there any statement or promise made by you that the company might at any time buy Section 5 when it was in a financial position to do so, or wished to do so, or could do so?

"A. I told them that many times in conversation; that was a part of the conversation that took place when this agreement was made between Mrs. Willis, Miss Doherty and Mr. Osborn. When I purchased Section 5 in the manner in which I have described, I had not any assurance from the Presidio Mining Company that it would take it off my hands at the price at which I bought it, or at any other price. When I returned here, after I had purchased the stock of the Silver Hill Mill and Mining Company, the Presidio Mining Company was not in a financial position to take it off my hands. As to what was the credit of the Presidio Mining Company as far as its ability went to borrow money at that time, I only know as far as we made efforts; we could not get any money. We tried to borrow money from the Wells Fargo Nevada Bank, with which we had done business for thirty years; they would not loan us any. When I did obtain a loan I got it from my friends in Texas, on my assurance to them that the property would pull out and pay the loans. In regard to the loans for the Presidio Mining Company for which we applied to the Wells Fargo Nevada National

Bank, and they declined to loan the company anything, Mr. Osborn made the application; he showed me their reply or wrote me their reply; and they would not loan over $2500, which was worse than nothing to us at the time. Later on, I borrowed money on behalf of the Presidio Mining Company; we got a loan; I have forgotten how much it was; five or ten thousand dollars—I think it was $5000, and as to the security given for that loan, Mrs. Willis, my brother, myself and Mr. Osborn joined in a guarantee up to $10,000. As to the prevailing rate of interest on money in Texas in the neighborhood of the Presidio Mine, the last loans I made there were at ten per cent; the prevailing rate of interest for individual loans is ten per cent there now."

When Mr. Noyes was under cross-examination, this subject-matter was recurred to by the cross-examiner, and in that connection the following occurred (Volume 3, page 764 of the record):

"Q. Was Section 5 ever offered by you to the Presidio Mining Company in any formal resolution—was Section 5 ever offered by you directly to the Presidio Mining Company at any meeting to the stockholders or directors of that company?

"A. Well, I offered it—I do not quite understand what you mean by formally offering it to the company. It was put up to them for action at a meeting as an organized body on November 19, 1913, and I am under the impression it was offered to them also in February when that resolution was passed. It was rather a colloquial offer. They were simply told it was open to the company if they wanted to take it. The company took no action—that is to say, the company could not do it; it had no money. In November the minutes recite that it had been offered to them; it was offered verbally at that meeting.

"Q. Never at any time, Mr. Noyes, was a formal resolution passed by the board of directors of this company rejecting Section 5. Is that right?

"A. It was rejected in that resolution of November, 1913, or announcement made that they could not take it. That is the only entry I know of on those minutes.

"Q. I will ask you again, was there any meeting held by the stockholders or directors of the Presidio Mining Company at which Section 5 was offered directly to them, and a resolution passed refusing to buy the same?

"A. None, except that one in November, 1913.

"Q. That simply refers to it in this language: 'Whereas, said Noyes offered to this corporation the opportunity to purchase said Silver Hill Mine at the cost thereof, but this company was unable to purchase the same and declined to do so, because of its financial inability'. That is the only place in any of the company's records where any mention is made of the purchase of Section 5 by the company from you?

"A. I think so. I have not read all of those minutes.

"The COURT. What is that date?

"Mr. ROSE. November 19, 1913.

"Q. You say that the Presidio Mining Company could not buy Section 5; is that a fact?

"A. It could not.

"Q. At the same time, it has paid you $63,000?

"A. Out of the ore that came out of Section 5, after it came out of Section 5 and had been reduced.

"Q. It installed improvements up to $79,000—it has been able to do that and still owes you some $50,000 or thereabouts at the present time?

"A. Under that contract, yes."

This testimony of Mr. Noyes does not, however, stand alone; he is corroborated in this respect by Miss Doherty who, on pages 813-4, of Volume 3 of the record, tells us that:

"As to what was said at these interviews at which I and Mrs. Willis and Mr. Noyes were present, in regard to the purchase of Section 5, well, Mr. Noyes spoke about this Section 5 being on the market, or was going to be on the market and that he would like to get it for the company, and spoke of how it could be gotten, and Mrs.

> Willis, regarding the same thing said, 'I am not able to get it'. She said 'I don't see how we are going to get it on account of this'. In the meantime she found out that instead of being $5000, I believe the books were gone over and Osborn taken to task—I believe they found the shortage was $11,000 instead of $5000, and Mrs. Willis said she did not see how they could buy anything that way, and assume this large debt of installing the cyanide plant. Mr. Noyes said, well, that he would get that and they could take it over afterwards. He said whenever the company was able to take it for what he paid for it, why, the company could have it if they wanted to''.

And so, likewise, in the testimony of Mr. B. S. Noyes, the following corroborative passage is found at page 909, of Volume 3 of the record:

> ''There had been a discussion between William S. Noyes, Mr. Osborn, Mrs. Willis, Miss Doherty and myself, stockholders of the company, as to the putting in of a cyanide plant, whether it could be done or not, and what disposition would be made of Section 5, which Mr. William S. Noyes had bought. Mr. Noyes stated that the company could have Section 5 at cost then or thereafter, and it was informally decided prior to the date of that meeting that the company could not take it, and the suggestion had been made and assented to by all parties, that as long as Mr. Noyes carried it, the company would work the ore and settle with him on a basis of one-half the net.''

And when we turn to the minutes of the meeting of November 19, 1913, at which meeting the contract referred to in the course of the testimony as the ''50-50'' contract was adopted, we find it acknowledged in the unanimous resolution of the entire directorate that Mr. Noyes

> ''offered to this corporation the opportunity to purchase said Silver Hill Mine at the cost thereof, but this company was unable to purchase the same and declined to do so because of its financial inability''.

It is to be observed, moreover, that the foregoing evidence is nowhere contradicted or qualified in any way, and therefore, that this very absence of contradiction lends additional strength to the testimony. It is submitted that this showing cannot be arbitrarily discredited and that, without some good reason, apparent in the record, to justify that conclusion, these witnesses cannot be discredited as in any way misstating or distorting the facts.

But it will have been observed that during the course of the testimony, while Mr. Noyes was under cross-examination, some apparent stress was sought to be laid upon the fact that Mr. Noyes' offer of Section 5 to the company was not embodied in a formal resolution; and the implication seemed to be that such a formal resolution was necessary to the validity of the offer, or to the action of the company in declining to entertain it because of its financial inability. But no greater mistake than this could well be made, because it is now thoroughly established in the corporation law of this country, that unless expressly restricted by affirmative charter provisions, or by the law of its creation, a corporation may contract precisely as a natural person, that a formal resolution is quite unnecessary, and that merely talking the matter over is sufficient; and nowhere has this view of the law been more fully accepted than by the Supreme Court of the State of California. Thus, in a typical case, the Supreme Court pointed out that although there was a period in the history of corporations when the most ordinary transactions were

required to be authorized by solemn resolution of the board, duly entered in the records and authenticated by the corporate seal, still, with the multiplication of corporations having for their object nearly every business pursuit known to modern times, the formalities previously required have been greatly abridged *(Greig v. Riordan,* 99 Cal. 316); and this view has never been departed from in this State, as may be evidenced by such further expressions of opinion as in *Leitch v. Marx,* 21 Cal. App. 208, 212-13, and cases cited; *Phillips v. Sanger Lumber Co.,* 130 Cal. 431; *Scott v. Superior Oil Co.,* 144 id. 140 . And see also, as supporting the same view *Fleckner v. Bank of U. S.,* 21 U. S. (8 Wheat.) 338, 355, 359; *Allis v. Jones,* 45 Fed. 148; *Columbia River Co. v. Vancouver Co.,* 52 Pac. (Ore.) 513, and cases cited. Other illustrations of this modern view may be found in the proposition that the manager of a corporation can be discharged by mere agreement of the directors without any resolution *(Mobile Ry. v. Hawkins,* 51 So. (Ala.) 37); a formal resolution is not necessary even for a ratification by the board of directors of a corporate breach of trust *(Henry v. Colorado Land Co.,* 51 Pac. (Colo.) 90; *Louisville Ry. v. Carson,* 38 N. E. (Ill.) 140; *Simmons v. Shaw,* 52 N. E. (Mass.) 1087; *Poche v. New Orleans Co.,* 27 So. (La.) 797; nor is an actual resolution essential to the ratification of a contract *(U. P. Ry. v. Chicago, etc., Ry.,* 163 U. S. 564, 595-8); so, unauthorized acts of officers or agents may be ratified without formal resolution *(Davis v. Brown Co.,* 110 N. W. (S. D.) 113). So, even without formal resolu-

tion, dividends may become available *(Spencer v. Lowe,* 198 Fed. 961, 965-6; *Barnes v. Spencer and Barnes Co.,* 162 Mich. 509, 520, 521; *Hartley v. Pioneer Iron Works,* 73 N. E. (N. Y.) 576). So, also, a resolution is not necessary either to authorize or to approve the answer of a corporation in a stockholder's suit *(Windgert v. First National Bank,* 175 Fed. 739); a binding contract by a corporation to pay a salary to an officer or director for services not incidental to his office may be made without any formal resolution of the board of directors *(In re Gouverneur Pub. Co.,* 168 Fed. 113); a formal resolution is not necessary to the authorization of a contract *(Smith v. Bank of New England,* 54 Atl. (N. H.) 385); a formal resolution is not necessary to the purchase by the corporation of the private business of a stockholder *(Iowa Drug Co. v. Souers,* 117 N. W. (Iowa) 300); nor is a formal resolution necessary in the matter of a purchase by a private individual of an interest in a corporate business *(Cyclops Iron Works v. Chico Ice Co.,* 34 Cal. App. 10).

8. The vouchers for traveling expenses do not establish that the Presidio Mining Company purchased Section 5, or that Mr. Noyes did not purchase it, or that he purchased it with company funds for company purposes; they are fully explained; and they fall within the rule de minimis non curat lex.

This aspect of the matter need not detain us long. Mr. Gleim fully explained these vouchers. He stated that he participated in the trips mentioned, and that "at that time we were putting in the cyanide installation, and trying to get Section 5. I made trips to Marfa

and El Paso: I did that without any expense so far as Section 5 was concerned. There was no money paid out". And the witness further explained that the Section 5 business was attended to at Marfa, the railroad station on the way to El Paso; that at the latter place, no business was transacted in respect to Section 5, but only such business as related to the installation of the cyanide plant; and he added that "the only expense that could possibly attach to it (Section 5) would be the expense of the automobile, the wear and tear on the machine". From the whole of Mr. Gleim's testimony, it is submitted to be entirely clear that Section 5 was referred to in these vouchers more to identify the trips, than to make any charge against Section 5. And that it was not in the mind of the corporation to make any charge against Section 5 in connection with these trips, is evident, not only from the tenor of the whole case, but also from the absence of any entry in the cash book, or any account in the ledger, connecting these trips in any way with Section 5. The claim of the complainants with reference to these vouchers reminds us of a Montana case wherein the complainant suing as a stockholder made accusations of fraud and prayed a receiver, and where the court declares:

> "The exercise of the extraordinary power of a chancellor in appointing receivers, as in granting writs of injunction, or *ne exeat*, is an exceeding delicate and responsible duty, to be discharged by the court with the utmost caution, and only under such special or peculiar circumstances as demand summary relief".

In this case, it appeared that some of the property and funds of the corporation had been improperly

diverted; thus an employee of one of the defendants had taken a cord of wood of the value of about $6.00 belonging to the corporation to the home of a defendant, and no charge against the defendant for this wood was found upon the books of the company; and that the same defendant had taken two ladies skirts of the value of $5.50 each, from the store and had neglected to either pay for the same or charge them to himself; and that the defendant took the sum of $1.80 for fees of a fraternal society and left a receipt, but afterwards the receipt was missing and there was no charge on the books against the defendant for the amount; and that another of the defendants acknowledged that one of the attorneys for the defendants had been paid $100 out of the funds of the company. Notwithstanding this, the Supreme Court of Montana applied to this condition of fact the maxim *de minimis non curat lex,* holding that the matters

> "of the cord of wood, the skirts, and the fees of the fraternal society are so trivial in character as that a court of equity would not be justified in attaching any importance to them standing alone";

and wholly ignored the $100 paid to the defendants' attorney out of the funds of the company. The order of the lower court denying a receivership was affirmed *(Jacobs v. Jacobs Mercantile Co.,* 96 Pac. 723).

9. **At the time when Mr. Noyes acquired Section 5, the Presidio Mining Company was financially unable to acquire that section.**

When we consider the decline in the price of silver, the depreciation in the quality of the ore mined from

Section 8, and the high cost of extraction by the pan amalgamation method, we cannot but concur in the view that, during the fall of 1912, the affairs of the company were in a most precarious condition; and if anything were needed to emphasize the financial helplessness of the company during that winter it would be the significant overdraft of over $3000, which, on January 31, 1913, stood against the company. And in addition to all this, the depletion of the treasury by Osborn's defalcations, and the imperious necessity of establishing the cyanide plant with its accompanying accumulation of indebtedness, if there were to be any salvation for this company, demonstrate its financial position at that time to have been such that the purchase of Section 5 was a grotesque impossibility; and this financial inability not only stands confessed in the agreement of November 19, 1913, but so stands confessed without the faintest attempt on the part of the complainant to impeach or qualify that confession. The claim that the company could have purchased Section 5 with the profits obtained during the period from January to May, 1913, is unresponsive to the facts in the record. And if, in view of the generally precarious condition of the company, and of the overdraft of January 31, 1913, the earnings of this period, such as they were, had been swallowed up in the purchase of Section 5, instead of being applied to the installation of a cyanide plant what would have happened? This inquiry answers itself.

Nor could anything deserve less to be taken seriously, when analyzed, than the claim of inconsistency upon the part of these defendants in arguing that the company

could not control the funds to purchase Section 5, and at the same time arguing that the company could pay Mr. Noyes $45,000 under the resolution of February 15, 1913. Laying aside the fact that Mr. Noyes never did receive this $45,000, it may be pointed out that if the intimation of this claim is that the money was to be paid regardless of the earnings of the company, then the English language has lost its meaning; if the intimation is that the first payment of $11,000 operated in detriment to the company, then the surrounding and connected historical facts are ignored; if the intimation is that Mr. Noyes received this $45,000, then the disclosures of the record are ignored; or if the intimation is that the future earnings of the company were not to be the source, and the only source, from which the remaining payments were to be made, then there is revealed a wholly distorted misapprehension of the meaning and scope—even the terms—of the resolution. The plain truth is that, so far as concerns any beneficial enjoyment, that first $11,000 were never received by Mr. Noyes; they passed from the treasury of the company through Mr. Noyes' hands into those of Mr. Osborn; and Osborn, being thus aided by Noyes to do the right thing, made good with this money his own shortage. The company received the equivalent of the $11,000 in ore obtained from Section 5 under the lease mentioned in the resolution; and Noyes received Osborn's secured note for the money loaned him. The company got the shortage made good, and got the ore, while Noyes retains the unpaid promise of Osborn; and thus, the company got the better end of the bargain. All that Noyes actually received under this resolution

was the sum of about $13,000—about half of what Section 5 cost him. No claim has ever been made by these defendants that, although the company was financially unable to purchase Section 5, yet it was able to pay this $45,000 because, without stopping to analyze the consistency or inconsistency of this proposition, the defendants are able to point out, and are assisted in doing so by the actual facts as opposed to complainant's hallucinations about the facts, that those first $11,000 were promptly returned to the treasury of the company without any increase in debt, while the remaining partial payments, made until the resolution lost its vitality, came out of the earnings, and the earnings only, the company receiving every penny above the fifty cents per ton called for by the lease—a lease so grossly unfavorable to Mr. Noyes, and so grossly favorable to the company, that finally Mr. Noyes was compelled to complain about it, which complaint resulted in the fairer agreement of November 19, 1913.

Even in that class of cases where a company actually possesses some estate or interest capable of consideration, the fact that one is president of a corporation, and therefore a director, does not prevent him from doing that which the corporation has lost its ability to do, even if it continued in existence (*Murray v. Vanderbilt,* 39 Barb. (N. Y.) 140; *Hannerty v. Standard Theatre Company,* 19 S. W. (Mo.) 82); the bad financial condition of a company often justifies a board of directors in doing what under normal circumstances they might not have done, desperate diseases requiring desperate remedies (*Ashhurst's Appeal,* 60 Pa. St. 290;

Sheldon Hat Co. v. Eickmeyer Hat Co., 56 How. Pr. 70; *People v. Ballard,* 3 N. Y. Sup. 845; *Button Co. v. Oswald,* 130 Ill. App. 290; *Werle v. Flint, etc. Co.,* 104 N. W. (Wis.) 743; *Cummings v. Parker,* 157 S. W. (Mo.) 629; *Cook v. Deeks,* 33 Ont. L. 209); and the prospect of "ruin for all concerned" *(Hancock v. Holbrook,* 9 Fed. 353, 362), will justify a conveyance by the directorate of all of the assets of a corporation; but a case is stronger yet where the purchaser is a stockholder merely, like Mr. Noyes, as distinguished from a director—being entitled to deal with the corporation itself at arm's length, the shareholder may even purchase the property of the corporation itself *(Culbertson v. Wabash Navigation Co.,* 6 Fed. Cas. No. 3464; *Gilmore v. Pope,* 5 Mass. 491; *Willoughby v. Comstock,* 3 Hill (N. Y.) 389; *Ely v. Sprague,* Clarke (N. Y.) 351; *Berks Turnpike Co. v. Myers,* 9 Amer. Dec. 402), and this, although the purchase may have been made for much less than the value of the property *(Mickels v. Rochester City Bank,* 42 A. D. 103). But where, as here, the corporation was not only without either the intention or the means to purchase Section 5, but was also without any right, title, interest or estate in Section 5, the claim that by its *ex post facto* dissent (here hypothetically assumed) it could either nullify Mr. Noyes' purchase or appropriate the results of his energy and financial standing, is so grossly unfair as to remind one of the historic canine in the manger—this decrepit concern could not itself acquire Section 5, and, if we are to accept the complainant's views, it is not now willing that anyone else should have it. Such views are at variance with all idea of equity and fair

dealing *(Traer v. Lucas Prospecting Co.,* 99 N. W. (Iowa) 290.

If, as a matter of abstract corporation law, we take it that the Presidio Mining Company had corporate power to borrow money, if it could, to finance Section 5 *(Chicago Ry. v. Howard,* 7 Wall. 392); why in the name of all that is rational, if it needed or desired Section 5, did it not do so? If this company was at that time financially good for anything, why not declare a bond issue? Why not have its bonds or other paper guaranteed *(Louisville Ry. v. Louisville Trust Co.,* 174 U. S. 552)? Why not adopt any of the remedial measures which are open to corporations that possess any financial ability whatever? The answer to these queries is to be found in the broken financial condition of the company during the winter of 1912-13, a financial condition of which the overdraft of January 31, 1913, is so significant an illustration, and a financial condition which the views of Cleveland, read in the light of all the other facts, show to be a condition of bankruptcy.

Mr. Noyes, as we have seen, was under no duty compelling him to devote his private funds or personal credit to this company even to save it from ruin; he might well direct attention to the procedure of raising funds by assessments, as Boyd attempted to do; and had the asserted "domination" that complainants have so much to say about enabled Mr. Noyes to compel the Mills faction and the Willis faction to overcome their repugnance to assessments, Mr. Noyes would doubtless have paid his share—but his share only, no more. No assessment was levied, however; after the Mills letters, no

hope that way lay; and Mr. Noyes did not possess sufficient influence, control or "domination" to overcome the objections of Mrs. Willis. What little money the company had, after Osborn's peculations ceased, together with the credit that William S. Noyes, and William S. Noyes alone, was able to get for the improvements on Section 8, were all swallowed up in the installation of the cyanide plant, the treasury of the company was depleted, the company was deeply in debt, and its very existence hung upon the success of the cyanidation. Where was this concern to procure the funds in 1912-13, with which to purchase Section 5? What funds could it look forward to for the improvement of its Section 8 alone, except those which resulted from the ability, energy and credit of William S. Noyes, as developed in a form of action upon which all the rest of the stockholders looked askance and in which they declined to assist in any concrete way? It was while things stood thus that William S. Noyes purchased the Section that the company declined to purchase, and was financially unable to purchase, even if it had desired or intended to do so; but looking at the situation in a common sense way, as any person of normal intelligence would look at it, the contention that Mr. Noyes, after having made this purchase with no assurance that the company would or could take it off his hands, whether at cost or otherwise (724), and at the risk of losing all that he had ventured alone and quite unaided by any assistance from either the Mills or the Willis people, should not, when the venture turned out to be productive, be entitled to stand upon a contract in no way in-

trinsically unfair, simply because, after the purchase was made and had become an accomplished fact, he became a director and was such, but not voting, when the equal division of the net was agreed on, must surely impress every fair man as a contention wholly barren of equity. Courts will not assume to understand the interests of contracting parties better than the parties themselves, and will look into all of the surrounding circumstances in construing conduct; none of Mr. Noyes' acts were inimical to this company; the financial inability of the company to accept Mr. Noyes' offer of the section at cost was beyond the scope of any duty on Mr. Noyes to relieve: "complaints come with an ill grace where the acts complained of alone preserve its existence" *(Gas Co. v. Berry,* 113 U. S. 322, 327); the conscience of a chancellor cannot be strongly moved to declare a director to be unfaithful to his trust who, for the sake of keeping an enterprise alive, pledges his personal credit in one direction (cyanide) and obligates himself personally in another (Section 5) at the risk of heavy loss (does any person of normal intelligence suppose for a fraction of a second that had Section 5 turned out to be a loss, either the Mills or Willis people would have paid Mr. Noyes notes?), and subsequently makes and insists upon contracts natural in themselves, not unreasonable, and profitable to the enterprise. Whence arises any inequity here? In order to do justice to one, is it necessary to do injustice to another?

We submit that, having due regard to rational scrutiny, the development of business and the necessities of public convenience do not require that corporate

operations should be unduly restricted, or hampered by prohibitive repression; and we believe that modern corporation law accords to directors and officers a growing freedom of action, evidenced by permitting their corporate dealings to stand unquestioned if in fact not fraudulent. For example, there is nothing in the fact that one is a stockholder or director of a corporation to preclude him from becoming a creditor of the corporation, or from advancing it money, or from selling it property; the obligations of the corporation executed therefor may be enforced by him; and this is true although his motive was not altruistic, but to protect and give value to his own interests *(Gould v. Little Rock Ry.,* 52 Fed. 680; *Salem Iron Co. v. Lake Superior Mines,* 112 id. 239; *Borland v. Haven,* 37 id. 394, 406; 159 U. S. 255; *Hutchinson v. Phila. etc. SS. Co.,* 216 Fed. 795); and, indeed, "a stockholder is not in all relations in privity with his corporation, and it is generally held that he is in privity only as to rights arising out of his contracts for subscription for stock" *(Kamm v. Rees,* 177 Fed. 14, 20). That there is a vast field for individual activity lying outside the immediate duty of a director or officer must, we think, be recognized; a logical test as to how far a director or officer may operate even in competition with his corporation, is whether the director or officer is charged with a specific duty by and for the corporation in the particular activity involved; in each case this must be a question of fact; and unless there is such a specific duty, individual action and personal profits are allowed. When for any reason the corporation cannot itself enter the transaction, as because of charter limitations, a refusal

of the third party to deal with the corporation, or financial inability, it is particularly obvious that the freedom of individual action should not be unduly hampered. Even a director does not forfeit his legal capacity for independent enterprise by becoming a director; he may deal with strangers, he may deal with his own company; and since the demands of modern enterprise require that in corporate as in other matters "the world must move on" (*Broderick Will Case,* 88 U. S. (21 Wall.) 503, 520), it has become a recognized rule that one who is connected with a corporation, whether as director, officer or stockholder, may employ his ability as he pleases, provided he does nothing detrimental to the actual business of the corporation with which he is connected; and this rule is especially applicable to cases wherein, for any reason, as for example financial inability, the corporation cannot itself enter the transaction. When Mr. Noyes acquired Section 5, he dealt entirely with a third party—the Silver Hill Company; and the proof repels the thought that the Presidio Mining Company had ever entrusted him with the duty of attempting to acquire the property for it. It is entirely plain that the Presidio Mining Company had never considered, during its entire history, the thought of purchasing Section 5, whether through the agency of Mr. Noyes or otherwise, or that it had ever formulated any plans of which the operation of Section 5 formed any part. No duty, indeed, rested upon Mr. Noyes to do the vain and futile thing of unduly persisting in his insistence that the company, rather than he, purchase the section; because, regardless of the plain

declarations of the stockholders, the fact was that the company was powerless to purchase because of its financial inability. This inability is not traced to any act of Mr. Noyes as its efficient cause; on the contrary, although a refusal by Mr. Noyes to contribute or advance his private funds for the benefit of the company would present no feature of legal, equitable or moral wrong, yet we know that he did actually contribute to the company, advancing it $10,000. This loan by him was, like so many other of his endeavors, wholly inconsistent with any desire by him to wreck this company, or to "loot" it, as his purpose is alleged in the hysterical volubility of the complainant's bill,—indeed, the conduct of the defendants throughout does not fit the scheme of the conspiracy alleged but was and is wholly inconsistent with it. There is, indeed, in this cause not an atom of evidence that Mr. Noyes used his position or his knowledge to prevent this company from accomplishing any purpose that it entertained of acquiring Section 5 in accordance with any plan to that end; it had never conceived or formulated any plan in respect of that section, nor had it ever expended a dollar, or incurred a dollar's liability, in connection with any plan for the acquisition or development of Section 5; and the claim that Mr. Noyes "prevented" the Presidio Mining Company from acquiring Section 5 stands wholly unproved. How, indeed, did he "prevent" the company from acquiring this land? Is it established that he went to any bank, for example, to slander the credit of the company? Is it established that he obstructed or halted any person about to loan the money that the company so badly needed? Is it established

that he "prevented" the company from borrowing money, when he himself loaned to it $10,000 without security? Did Mr. Noyes "prevent" this company from acquiring this land, when he was willing to turn over the section to the company at cost? Is the financial inability of this company to be converted into an act of "prevention" by William S. Noyes? Could anything be more extraordinary or unjustifiable than that? In point of fact, in the acquisition of Section 5, Mr. Noyes took nothing that belonged to the Presidio Mining Company and imposed upon that company no burden that it was unwilling to assume. The bill in this cause rants much about conspiracy; but no conspiracy could have been effectual which did not prevent the company from accomplishing a purpose to acquire Section 5,—a purpose that the company never entertained, and that, if it was entertained, could not, by reason of financial inability, have been accomplished.

And if it be true, as we think it is, and as we have already urged, that no rule of corporation law prohibits a director from engaging in another similar enterprise, it must then be conceded that such director should be entitled to acquire the land or other property, appropriate to the new enterprise; and if any regard for logic is to grace one's thinking, it must be true that if no principle of corporation law prohibited the acquisition by Mr. Noyes of Section 5, then that property was his —his very own— to do with as he pleased, so long as he did not intentionally employ it for the set purpose of specifically injuring the Presidio Mining Company. If that property became legally his, he had the obvious

legal right to enter into contracts concerning it, whether with the Presidio Mining Company or with any other party; and if he entered into such contract, he had the legal right to make the best bargain he could, and to insist that the terms of the bargain should be lived up to. It is not the law that, even when a director contracts with his own company, he must, in order to avoid the imputation of fraud, contract at a loss to himself; if he could not contract at a profit, he would not contract at all; if he would not contract, there might be no one else who would; and if he may contract at a profit, how can such a profit be treated as a badge of fraud? But no reasonable man familiar with business transactions will infer that because I have made the best bargain I could with reference to my own property, therefore that bargain is an inequitable or fraudulent bargain; on the contrary, in the absence of positive and convincing evidence of fraud, the courts do not impeach grown men's bargains upon supposition or guess-work. The foregoing views are recognized, both directly and indirectly, in many authorities, some of which may here be cited:

Cowell v. McMillin, 177 Fed. 25;

Mackey v. Burns, 16 Colo. App. 6;

N. Y. Automobile Co. v. Franklin, 97 N. Y. S. 781, 785;

Cons. Fruit Jar Co. v. Wisner, 93 id. 128;

Barr v. Pittsburg Plate Glass Company, 51 Fed. 33; 57 id. 86;

Lagarde v. Anniston Lime Co., 126 Ala. 496;

McDermott Mining Company v. McDermott, 27 Mont. 143;

Keokuk Packet Co. v. Davidson, 95 Mo. 467;
Railroad Co. v. Stubbs, 77 Maine 594;
Jacksonville Sugar Co. v. Dozier, 53 Fla. 1059;
Hannerty v. Standard Theatre Co., 109 Mo. 297;
Citizens Trust Co. v. Tompkins, 97 Md. 182;
Murray v. Vanderbilt, 39 Barb. 140;
Jasper v. Appalachian Gas Co., 153 S. W. (Ky.) 50;
Johnson v. Stoughten Wagon Co., 95 N. W. (Wis.) 394, 397;
State v. Lazarus, 105 S. W. (Mo.) 780, 783;
Kubach v. Irving Cut Glass Co., 69 Atl. (Pa.) 981, 983;
Veeder v. Horstman, 83 N. Y. S. 99, 101;
Gray v. Quicksilver Mining Co., 68 Fed. 677, 683;
Clarke v. Trust Co., 100 U. S. 149;
American Circular Loom Co. v. Wilson, 198 Mass. 182.

In the case last cited, the principle is thus stated, supported by a very abundant citation of authority:

> "*If there was property which was necessary for the business of the plaintiff, and which he (the director) knew that the plaintiff desired to acquire, and intended and was able to purchase and pay for, in order to protect and develop its business interests,* it would be a violation of his duty for him *secretly to purchase that property,* either for the purpose of afterwards selling it to the plaintiff at an advanced price and then taking advantage of its interests, or of using such property otherwise to the injury of the plaintiff; and the plaintiff could, by proper proceedings in equity secure to itself the benefit of his purchase".

We desire in this connection to call the attention of the court particularly to the underscored language in the foregoing quotation.

10. The complainant has failed to establish that Section 5 was purchased with funds derived from the Presidio Mining Company.

The claim of this complainant is not that Section 5 was purchased by this company; the complainant is compelled to admit that the section was purchased by Mr. Noyes (see, for example, amended bill, paragraph 7, page 43; paragraph 12, pages 46, 48 top; paragraph 13, page 56; paragraph 14, pages 57, 58); but the claim of the complainant is that Section 5 was purchased by Mr. Noyes under such circumstances that he should be charged as a trustee thereof for the benefit of the company. Not only is this claim apparent from the pleadings, not only does it run through the history of this litigation, not only is it confessed by the change of front of this complainant from a claim of resulting trust to a claim of constructive trust (hereafter more fully considered) but the concession that Section 5 was purchased by Mr. Noyes is clearly exhibited in the formal declarations of complainant at page 693, 694 of volume 3 of the record. At that place, defendants' solicitor asked complainant's solicitor if it might be stipulated that the total cost of Section 5 to Mr. Noyes was $24,009.33, and complainant's solicitor so stipulated. The learned judge of the court below then inquired whether this stipulation went to the extent that Mr. Noyes paid that money out of his own pocket, and whether complainant's claim was not that it was money

of the corporation. In response to this inquiry, complainant's solicitor disclosed what he declared to be "our whole contention", which contention was in substance that Mr. Noyes purchased Section 5 with money that he borrowed upon his personal notes; that about a year or a year and a half thereafter, Mr. Noyes paid off those notes; and that the money with which the notes were paid was taken from the corporation. While this colloquy discloses that it was Mr. Noyes, but not the company, that purchased Section 5, the further observation is permissible, viz: that the "whole contention" of complainant was, not that Mr. Noyes was guilty of any obliquity in the purchase of Section 5, but that he had no right to take company money to pay notes given for the moneys that enabled him to make the purchase. It is obvious that, upon this theory, if Mr. Noyes had purchased Section 5, and had stopped there, obtaining money to pay off the notes from other sources than the company, this complainant would have endured no injury and would have no cause for complaint; it was not the purchase but the taking of the money that he complained of; and if that money were not in fact taken from the company, but were derived from other sources individual to Mr. Noyes, this complainant, upon his own formulation of his asserted grievance, would have suffered no more detriment than the corporation itself.

But these defendants insist that the history of Section 5 discloses no fraud whatever, that there was no wrong done to this corporation by Mr. Noyes' purchase of that section, that the funds which paid off Mr. Noyes' notes have been, without contradiction, traced to sources

wholly disconnected from this corporation, that the identity of these funds, as coming from foreign sources, has not only not been attacked, has not only been open to easy contradiction if misstated, has not only been substantially admitted, but has been fortified by unimpeached documentary corroboration; and that in other respects, the extravagant claims of this complainant will not withstand analysis.

The claim of this complainant is specifically this:

> "Our claim is this, our whole contention is this: that Mr. Noyes borrowed the money and gave his personal notes, for instance, one for $10,000, another for $10,000, and another one for $5,000, and with that money, he paid to the stockholders of the Silver Hill Mill and Mining Company the sum of $24,000, but that the notes themselves which he gave, from which these moneys were paid, were not paid until a year or a year and a half thereafter that particular period, and the moneys were taken from the corporation." (694)

We think that this contention should be supported by competent proof of specific concrete facts; and that especially in view of the rule that fraud is never presumed but must be clearly shown, the burden rests upon this complainant to establish, in point of actual fact, that the money that, a year or a year and a half after the purchase of Section 5, paid off those notes was authentically money taken from the corporation, and not money derived from some independent, disconnected source. That Mr. Noyes purchased Section 5, the complainant concedes; that Mr. Noyes obtained the necessary funds, not from the company, but from strangers, upon his personal notes, the complainant concedes; and that these notes were not paid off until a considerable

time thereafter—twelve or eighteen months thereafter—the complainant concedes; but in the attempt to fasten a liability upon Mr. Noyes, the complainant asserts that the money that paid off these notes was taken from the corporation. What, then, is the actual situation disclosed by the record?

The original bill of complaint suggested no such theory as that now advocated by complainant; that pleading, as we have seen, proceeded upon the hypothesis of a resulting trust,—a hypothesis nullified, however, by the fact that, even upon complainant's view, the furnishing of the purchase price by the corporation was neither contemporaneous with the purchase, nor intended as such purchase price, the money being "taken" from the company; and the contention now advanced was and is a mere afterthought suggested by the pressure and exigencies of the case. And it is to be noted that all that portion of this pleading which seeks to deal with this subject-matter (20-21), proceeds upon information and belief merely; no attempt is made to enlighten us as to the source of the alleged information or the grounds of the alleged belief; obviously, the pleader had no original or personal knowledge of or concerning the matters referred to; and we respectfully submit that this lack of knowledge, and this reliance upon unidentified hearsay, is one of the factors bearing upon this situation. The same criticism is true of the amended bill; the heresy of resulting trust is adhered to; the pleader has no more stable foundation for his allegations than information and belief (60-61); and the afterthought now suggested is there nowhere

presented. This amended bill was filed on September 25, 1915 (90), and on March 16, 1916 (238), some five months later, the supplemental bill was filed; and while this bill uproots the resulting trust theory by confessing that the moneys that paid for the Silver Hill Company stock were derived from sources wholly foreign to the Presidio Mining Company, yet it makes no claim that Mr. Noyes' notes were paid with money taken from the corporation; and while this bill alleges that the company has paid Mr. Noyes more than twice "the amount *advanced by him* for said Section 5" (par. VII, p. 233) and then indulges the ambiguous and illusive fantasy, pregnant with impossibilities, that the company could have purchased Section 5 with the 1913 payments to Mr. Noyes, still the pleading wholly fails ever to assert what he actually did with the moneys received from the company, or that he actually used those moneys to pay off the notes in question.

Is the theory, now advanced, sustained by proof? The impossible character of this theory is at once suggested to the mind by the complainant's gross error as to the time when the notes in question were paid. The assertion of the complainant is that "the notes themselves * * * were not paid until a year or a year and a half thereafter"; the fact is, however, that these notes were all paid during the year 1913, their payment beginning on August 19, 1913, and ending on November 26, 1913; and since the deed from the Silver Hill Mill and Mining Company to Mr. Noyes, conveying Section 5, was dated, acknowledged and recorded on May 26, 1913 (706-709), it is apparent that this com-

plainant is as much mistaken in his assertions as to time, as he is in his assertions as to other aspects of the situation. And if this complainant had himself possessed clearer conceptions concerning this subject-matter, he would have been able to tell us at least when the money was taken from the company which he affects to trace into the payment of these notes; in dealing with a subject matter so fluid as money, which can pass speedily from one to another within the narrowest time, we think that the complainant, if in possession of any concrete facts whatever, might well have been more definite and circumstantial as to time; and we urge that the vague and unsupported phrase "a year or a year and a half thereafter" is entirely too uncertain to satisfy the standard rules as to the pursuit of trust funds, and exhibits the sciolism of our litigious adventurer. Is, then, this belated and nebulous theory sustained by competent proof?

We submit that complainant's failure has been complete. Not one of his witnesses has established that a penny of money, taken by Mr. Noyes from this company, paid off, a year or a year and a half after the notes were made, a single one of these notes. Neither Gardiner or Herger established any such facts; nor could have, because their relations with the company ceased on January 31, 1913 (there is a misprint in the date of Herger's resignation, on page 509: "1915" should be "1913"); and there is no proof of any knowledge upon their part of transactions asserted to have occurred a year or a year and a half thereafter, or one day thereafter. Nor did the complainant's tardy

theory receive support from Peat; but while nothing in Peat's testimony traces company money into these notes, we are advised by him that in January, 1914, Mr. Noyes loaned the company $10,000, took its note for that amount, and had the note paid in part on July 27, 1914, and in full on October 13, 1915, with interest (461-2)—did a fervid desire to "control the management" betray this complainant into distorting these facts into the theory now put forth? Nothing in support of this theory was developed from the witnesses Davis, Clause and Gleim. The testimony of the complainant himself was a most amazing farrago of hearsay, conclusions and gossip; and, of course, this witness, as well as his wife, could not have had any original or personal knowledge concerning the matter under discussion. Nor was it shown by Miss Doherty that a single penny of corporate money paid off any of these notes. Here the complainant rested; and while some further testimony was taken by him, yet none of it was relevant to the present inquiry. Surely, it cannot be said that there is any proof here of a theory which did not make its appearance until after the complainant had rested and while Mr. Noyes was upon the witness stand (694).

Notwithstanding that no obligation really rested upon Mr. Noyes to do so, yet he showed, without contradiction and with corroboration, whence the money was derived which paid off these notes. Beginning with page 682 of the record, Mr. Noyes tells us:

> "In the latter part of 1912, there was a discussion between myself and the stockholders or directors of the company in regard to the purchase of Section 5; there

were discussions. The discussions were with Mrs. Willis, Miss Doherty and Mr. Osborn. I had a conversation with Mr. Osborn in relation to the purchase of Section 5, somewhere in the latter part of November or the middle of November, 1912. I told him I had received a letter from Mr. Gleim saying that Section 5 might be on the market, and that he understood from the engineers who were examining it that they were going to drop it. Unfortunately, that was a personal letter, and I seldom keep personal letters; I haven't got it. I told Mr. Osborn that if it came on the market that I would like to get it to help out the Presidio. I told Mrs. Willis the same thing and Miss Doherty. They said they were willing I should do so if possible. Later on I again received information by letter from Mr. Gleim that these people had dropped it; when I went down on this cyanide business I saw the people who owned the stock of the Silver Hill Mill and Mining Company—that was the corporation that had been organized on that property. When I went on that trip, I had an intimation from one of my friends that the mine could probably be had for $10,000 or $15,000. Before I went down to Texas, I had arranged with my friend, Mr. Bowers of Ashland, Oregon, that he would loan me $10,000 if I wanted it; and after I got to Texas and found out I would need money—the price was higher—I arranged to get a loan from the Marfa National Bank, through the intervention of Mr. Cleveland. I bought all of the stock of the Silver Hill Mill and Mining Company for about $25,000. This memorandum which you show me is correct; there were other charges that ran it up; these are the bare sums paid to the owners of the stock. There were other charges that made it cost me, by the time I got it all, $25,000 and a few dollars. These figures, $21,568.66, including the purchase from Young for $10,000; Colquitt, $3,746.66; W. H. Colquitt, $1,200; T. C. Crossen, $1,240; J. C. Midkiff, $400; F. W. Lane, $4,300; H. M. Daugherty, $175. Two sums I have got together there amount to $1,068.67. There are 64 shares, and that includes 62 shares that Lane was handling. Yes, there is an error there. There is 188 shares, and his reservation that is down there at 64 shares. That cost $1,068.67. There is an error in transcribing that some-

where. There is to be added to that schedule the difference between $1,068.75 and $175.

"In the purchase of this stock, I borrowed $10,000 from Benton Bowers on January 7, 1913, and $10,000 from the Marfa National Bank; and I gave my note in part payment to Henry Young for $5,000. I repaid the money that Benton Bowers loaned me, on October 1, 1913, by drawing $6,000 from an account I had in New York through J. Barth and Co. here, and drew my check out of my bank account here for the balance, with interest, $4,584.15. The loan from the Marfa National Bank of January 25th, I paid on the 19th of August, 1913, by a draft on the Anglo-London & Paris National Bank, on New York, to the order of B. S. Noyes, and endorsed to me. That was a loan I made from my brother and I paid the Marfa National Bank loan. The note to Harry B. Young, I paid by draft on Ashland, Oregon, for $5,000; it was another loan I made from Mr. Bowers. The second loan from the Marfa National Bank I paid October 4th, by a telegraphic transfer from a sister of mine in New York who had sold some property for me, and drafts for the balance from the Anglo Bank here. Then those renewals of my brother, I paid November 16, 1915. The one from Mr. Bowers borrowed November 26, 1913, I repaid September 25, 1915."

And further dealing with the same topic, the following occurred:

"Mr. HARDING. It may be stipulated that the total cost of Section 5 to the defendant W. S. Noyes was $24,009.33?

"Mr. ROSE. Yes.

"The COURT. Does your stipulation go to the extent that Mr. Noyes paid that money out of his own pocket? Your claim is that it was the money of the corporation.

"Mr. ROSE. Our claim is this, our whole contention this: that Mr. Noyes borrowed the money and gave his personal notes, for instance, one for $10,000, another for $10,000 and another one for $5,000, and with that money he paid to the stockholders of the Silver Hill Mill and Mining Company the sum of $24,000, but that the notes

themselves which he gave, from which these moneys were paid, were not paid until a year or year and a half thereafter that particular period and the moneys were taken from the corporation.

"The COURT. That is what I understand your contention to be.

"Q. While we are on that subject, where these moneys came from, Mr. Noyes, you testified yesterday that when you paid the Benton Bowers note, you drew upon New York for $6,000, was it—was that the amount? A. Yes.

"Q. How long prior to that time had you had that money on deposit in New York?

"A. I had money on deposit with that firm going back as far as 1898. I drew this money from Herzog and Glazier, in New York; I had a current account there several years old; they are bankers and brokers in New York. I had continuously from the first of January, 1913, up to the time I drew that $6,000, as much as $6,000 on deposit with that firm, and a great deal more; not always in cash; part of the time in stocks that I had bought and speculated in. The property in New York that my sister had sold for me, and the proceeds of which sale she had transmitted to me as I have heretofore testified, I had owned for about ten years prior to the sale thereof." (693-5)

A significant corroboration of Mr. Noyes will be found further along in the record, where the following took place:

"The COURT. About this first note. What note was that you paid with the funds you got from New York?

"A. The Benton Bowers note. In paying that note, I got $6,000 of the funds from my banking house in New York, Herzog & Glazier. I went to J. Barth and Company here, and asked them to get a telegraphic transfer from Herzog & Glazier; they got a telegraphic transfer from them and gave me a check on their bank here, which I have here—showing the source of that money—on the Bank of California. That telegraphic transfer was sent over their private wire; it was not the ordinary form of transfer.

"Mr. HARDING. I will offer this check in evidence.

"Mr. ROSE. No objection.

"Thereupon said check was received and read in evidence in said cause, and marked Defendants' Exhibit 'K' and was and is in words and figures as follows, to wit:

DEFENDENTS' EXHIBIT 'K'.

"No. 73886.

San Francisco, September 27, 1913.

BANK OF CALIFORNIA

"Pay to the order of William S. Noyes Six Thousand (6000) Dollars.

J. Barth & Company.

"(Endorsed):

"William S. Noyes for account of the *United States National Bank of Ashland, Oregon.*"

"Mr. HARDING. We will bring a witness from J. Barth & Company here to show the transaction.

"Mr. ROSE. *We do not question this transaction. We admit the fact of this transfer of money in this manner.*" (700-1)

And finally, not to multiply quotations, Mr. Noyes remarked, while under cross-examination, that:

"The only ore body that I examined in Section 5, before paying for it or for the stock of Section 5, was that Stope 13, and that examination was necessarily confined to looking at these two drifts and the winze. Then I made my payment to the stockholders of the Silver Hill Company. I borrowed the money to make these payments from Benton Bowers, the Marfa National Bank and Harry Young. I had made arrangements for it long before. I had made arrangements to get this money before I had examined the ore bodies; after I examined the ore bodies, I made the payments or gave these notes." (749)

This account by Mr. Noyes is not only corroborated as we have seen, but it derives further support from the testimony of Mr. Bowers, who tells us that:

"I remember seeing Mr. Noyes in Ashland, Oregon, in the latter part of 1912, and had a financial transaction with him at that time. He made an arrangement for borrowing $10,000 from me. He asked me if I would be in a position to loan him—if I had any money on hand and I told him I had a little. He says, 'If I should need some money, would you be in a position to let me have it?' And I told him I would put myself in that position. He afterwards borrowed $10,000 and gave me a note for it. I do not remember the tenor of the note. It seems to me it was dated one day after date. I know I made a great many of my notes that way, and then as long as the people pay me the interest right along, keep up the interest, I am not so particular about the principal. I sent the note to Mr. Noyes, the bank did, when he paid it. The money was paid into the First National Bank at Ashland, Oregon, and the cashier there has a power of attorney from me to transact business for me when I am away. I was down in Mexico at the time when Mr. Noyes sent the money in. This note that you show me here for $4,000 is one of the notes. There were two notes; and the amount of the other note was $6,000. The $10,000 was all loaned at the same time. He sent the notes to the bank. I sent him the notes to sign and he sent up a $10,000 note, or two notes, I forget which, and I did not like the way they were drawn, so I filled out the notes and sent them back for his signature. He wanted the notes so he could take them up separately. These notes were paid some time in 1913. I would have to look in my books to find out; I do not know the exact date when these notes were paid, but I think it was some time in August or September of 1913.

"Q. At the time when Mr. Noyes borrowed this money, did he tell you what he wanted to borrow the money for?

"Mr. Rose. I object to that.

"The Court. Objection sustained." (794-5)

Not only does Mr. Noyes derive support from Mr. Bowers, but he is further fortified by the statement of Mr. Cleveland, one of the directors of the Marfa National Bank. The testimony of Mr. Cleveland begins

at page 898 of the record, and, so far as relevant to the matters in question here, terminates at page 903; but before leaving the testimony of Mr. Cleveland, it may not be inappropriate to remind the court that this director of this National Bank, doing business at Marfa, on the scene and familiar with the history and surroundings of the Presidio Mining Company, and a man whose business and duties as such director required him to keep in touch with such matters, actually tells us that "in 1912, and the early part of 1913, I would not have loaned the Presidio Mining Company any money, without additional security" (904). Taking into consideration, then, the flat failure of this complainant to produce an atom of reliable evidence to establish that the moneys which paid off these notes were taken from this company, together with the affirmative, uncontradicted and corroborated statement of Mr. Noyes,—and why should a court "arbitrarily reject the uncontradicted testimony of a number of intelligent and unimpeached witnesses"? *(Anglo-Am. Provision Co. v. Davis Provision Co.,* 112 Fed. 574; 191 U. S. 376)—how can it fairly be said that he has succeeded in tracing corporate moneys into the payments of these notes? As remarked by an accomplished federal judge, "It is not the province of the court to find theories, but facts" *(The Helen G. Moseley,* 117 Fed. 760, 762); contentions based upon mere theoretical conjectures, without any substantial basis of real fact for them to rest upon, and which rely upon the process of building upon one assumption another assumption, have no weight whatever (see an illustration of this thought in *Waters-Pierce Oil Co. v. Van Elderen,* 137

Fed. 557); and purely theoretical hypotheses—if they amount to that—unsupported by proof, cannot be permitted to outweigh direct, uncontradicted and corroborated testimony which carries conviction to the ordinary mind. Upon the record as exhibited in this cause, how can any experienced appraiser of evidence fairly say that this complainant, upon whom rested the burden of proof in that regard, has established that the notes in question were paid off with money taken from this corporation?

Bearing in mind the foregoing facts, we submit that where it is sought to charge one as a trustee, it must first be shown that a foundation exists legally sufficient to support the charge; until that is accomplished by competent and sufficient evidence, the charge is vapor. The fact that a man is a director of a corporation is, we submit, an entirely insufficient foundation upon which to rest the charge that he is a trustee for the corporation of real property that may happen to stand in his name; the fact that after one becomes a director of a corporation, he acquires a parcel of real property does not constitute him a trustee of that real property for the corporation; if it did, no rational man would accept the post of director; in other words, other and additional facts must be proved by the claimants of the asserted trusteeship, as the foundation to support their claim, and unless that foundation be laid, the claimants have no *locus standi*. In a word, the duty to establish the facts constituting the asserted trust, or out of which the trust is asserted to arise, is impressed upon those who claim the existence of the trust; in cases of

similar impression to this, the burden rests upon the complainants to show, and to show distinctly, and specifically, that the moneys that paid off the notes were in fact the moneys that "were taken from the corporation"; and all doubts in connection with this inquiry will be resolved against the complainant.

> "It is the general rule, as well in a court of equity as in a court of law that, in order to follow trust funds, and subject them to the operation of the trust, they must be identified * * * in carrying out the rule, when it comes to proof, the owner must assume the burden of ascertaining and tracing the trust funds, showing that the assets which have come into the hands of the trustee have been directly added to or benefitted by an amount of money realized from the sale of the specific goods held in trust; and recovery is limited to the extent of this increase or benefit. * * * Moreover, if there has been expenditure, and the funds are gone, and no specific property or money is found instead of the funds, it is inequitable that some other property found should be applied to pay one creditor in preference to another. So, funds that have been dissipated or that have been used to pay other creditors or that have been spent to pay current business expenses are not recoverable because they are gone and there is nothing remaining to be the subject of the trust."
>
> *J. M. Acheson Co.*, 170 Fed. 427, 429, 430.

In a later case, the Circuit Court of Appeals observed that:

> "The same court which decided Smith v. Mottley, however, subsequently held, in Board of Commissioners v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100, that the mere fact that the misuse of a trust fund has gone to swell, in one form or another, the general assets of a bankrupt, is not enough to charge a lien on such assets; and that, to impress a trust upon the property of a tort feasor, who has used the trust fund in his private affairs, it must be traced in its original shape

> or substituted form. We fully concur in this statement of the law. No doubt the individual whose property has been converted has a high equity and is entitled to certain well settled presumptions; but we cannot assent to the proposition that he may trace his money into any specific fund or security merely by inferences based on presumptions without substantive testimony to sustain them. The burden of proof is on the claimant at the outset; it rests upon him at the close of the case. If he has not, then, upon the whole proof, made clear the final resting place of his converted property, or its substitute, he cannot sustain his claim."
>
> *In re Brown,* 193 Fed. 24, 29.

The case last cited went up to the Supreme Court, *sub nomine Schuyler v. Littlefield,* 232 U. S. 707, and the decree of the Circuit of Appeals was affirmed. In the Supreme Court, after holding that trust funds deposited by a trustee in his individual bank account are dissipated if the mingled fund is at any time wholly depleted and cannot be treated as reappearing in sums subsequently deposited in the same account, the court proceeded to deal with the question of the burden of proof; and in that regard, thus stated the law:

> "Like all persons similarly situated, they (appellants) were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their interborough stock, their claim must fail. If their evidence left the matter of identification in doubt, the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Company, some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund." (Page 713)

And finally, not to multiply citations upon the subject matter of the burden of proof, we call attention

to the following language of Ross, Circuit Judge, in delivering the opinion of this court, in *Titlow v. McCormick,* 236 Fed. 209, 211:

> "In Schuyler v. Littlefield, trustee of Brown & Company, 232 U. S. 707, Sup. Ct. 462, 58 L. Ed. 806, it was distinctly adjudged by the Supreme Court that where one has deposited trust funds in his individual bank account, and the mingled fund is at any time wholly depleted, the trust fund is thereby dissipated and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account. It was in that case further adjudged, as it has been in many others, that one seeking to charge a fund in the hands of a trustee for the benefit of all creditors as being the proceeds of his property, and therefore a special trust fund for him, has the burden of proof, and if he is unable to identfy the fund as representing the proceeds of his property, his claim must fail, as all doubt must be resolved in favor of the trustee who represents all creditors.
>
> "This court also so held in the case of in re J. M. Acheson, 170 Fed. 427, 95, C. C. A. 597."

Looking, however, to the case as made by the complainant, and ignoring for the present the uncontradicted proof of the defendants, we do not hesitate to declare that this record is barren of any attempt, even, by the complainant, to establish that the money that paid off these notes was money that was taken from the corporation; in point of fact, this record utterly, wholly and entirely fails to show what became of any moneys received by Mr. Noyes from the corporation—whether they were deposited at all, when they were deposited if deposited at all, where they were deposited, in whose name or to what account they were deposited, what particular use, if any, Mr. Noyes made of them, or what their final destination was; and

for anything that this record, so far as concerns complainant's case, anywhere discloses, the moneys received by Mr. Noyes from the corporation may have been applied by him to any one of a thousand or more varied purposes—to adopt the language of the Court of Appeals of the State of New York, in speaking of withdrawn trust funds, "it does not appear what became of the funds thus withdrawn" *(Attorney-General v. North Amer. Life Ins. Co.,* 82 N. Y. 172, 193-4). And as recently observed:

> "But, further, there is no proof as to what bank or fund received any of the petitioner's money; for all that appears, it may all have been kept in the store, or all put in either bank. In other words, the most that petitioner can do toward bearing the burden of proof is to show that its money was put in three funds, or some one or more of them; but when or in what proportions cannot be spelled out. Such evidence amounts to no more than showing that somewhere there was in bankrupt's possession, or under its control, at all the times complained of, more cash or credits than petitioner now claims. This is not identification at all, nor is it tracing, for cash is never traced by showing that it went into the general estate; and the proof here goes no further."
>
> *In re A. D. Matthews Sons,* 238 Fed. 785, 786-7.

What proof is there here, we ask, which establishes that the moneys received by Mr. Noyes from this corporation were not all dissipated in quite other directions long before a dollar was paid on these notes? It is alleged in the amended bill, and conceded by the answer, that during 1913 Mr. Noyes received the following sums:

Feb. 24	$6,000
Feb. 28	5,000

Mar. 18	5,000
May 15	1,000
Sept. 6	3,500
Oct. 1	3,000
Oct. 14	1,000

These figures represent an aggregate of $24,500; but the defendants admit that in addition to this sum, he received the further sum of $2003.60 as royalties under the lease dated January 25, 1913 (185). Of these amounts, we can readily account for the items of February 24, $6,000, and February 28, $5,000; we know where this money went; we know that it found its way back into the company treasury, and we know that it did not go to pay off these notes. Eliminating these items, we find that between March 18, and October 1, Mr. Noyes received $12,500; but where did this money go? There is not a particle of proof that traces this money; there is not an atom of evidence to show, for example, where, or when, or to what account, it was deposited, if deposited at all; and there is no proof whatever that a single dollar of it was applied to these notes,—there is nothing whatever to show that one dollar of this money was in Mr. Noyes' possession when he began paying these notes. The first of these notes that was paid was the Benton Bowers note for $10,000; that note was paid on October 1, 1913; it was paid with $6,000 telegraphed from New York (684, 700-1), and the balance "out of my bank account here" (684)—though what "bank account" this was, we are not told; there is no proof to the contrary of this.

The Marfa Bank note was paid in part on August 19, 1913, with money borrowed from B. S. Noyes, and in full on October 4, 1913, with funds derived from the sale of the New York real estate; but not one dollar of Presidio Mining Company money was traced into these payments. And the Harry Young note was paid off on November 26, 1913, with money borrowed from Benton Bowers.

In other words, no proof is made as to what became of the moneys received from the Presidio Mining Company; what Mr. Noyes did with those moneys nowhere appears; to adopt the language of the Court of Appeals of New York, it does not appear what became of those funds; and from the beginning to the end of the cause, no proof has appeared to show what moneys discharged the notes in question, or that company moneys were used for that purpose. What is there here, indeed, to show that the moneys received by Mr. Noyes from this company were not all dispersed in one direction or another, for one purpose or another, before any of these notes were paid?

The notes with which we are concerned were all paid off during the period of about three months beginning August 19, 1913, and ending November 26, 1913; on August 19, 1913, the Marfa Bank obligation was partly paid with funds obtained from B. S. Noyes; on October 1, 1913, the Bowers note was paid, partly from funds telegraphed from New York, and partly with funds "out of my bank account here"; on October 4, 1913, the balance of the Marfa Bank note was paid with funds derived from the sale of New York real estate; and on

November 26, 1913, the Harry Young note was paid with funds obtained from Mr. Bowers. Not only was this showing uncontradicted, but we submit that it is not of the slightest judicial consequence what moneys Mr. Noyes may or may not have received antecedently to the payment of these notes, unless it be further shown not only that those moneys were not disbursed by him, and were actually in his possession when he began paying the notes, but also that those moneys actually were applied by him to the payment of the notes in question; this, however, was not done. But, it may be asked, what moneys did Mr. Noyes receive from the company during the period within which the notes in question were paid? This inquiry is answered by the pleadings and testimony (60-61, 185, 532, 696, 533). We are there informed that, up to October 21, 1913, Mr. Noyes drew $24,500; that he drew under the fifty cent lease $2003.60; and that he received a balance of $3485.90 in December, 1913, and $1500 on January 2, 1914, a total of $31,489.50; and that he drew nothing more until March 7, 1914. But as against these figures, and during the same period of time covered by them, we know that he loaned Osborn $10,689.75, and that this "looter", "wrecker" and "pillager" actually loaned this company $10,000, these sums aggregating $20,689.75; and we know that his $10,000 loan to the company was not repaid until after March 7, 1914.

Knowing, then, where $20,689.75 went to, out of the $31,489.50 received during this period, will it now be pretended that he paid off notes aggregating $25,000 with a balance of $10,799.75? Let us, however, limit the

time more closely. If, instead of extending the time to March 7, 1914, we limit it to November 26, 1913, when the last of these notes was paid, we have the fact that from January, 1913, to November 26, 1913, he received $24,500 plus $2003.60 royalty, all aggregating $26,503.60; out of this must come $10,689.75 loaned to Osborn; did Mr. Noyes, then, pay off $25,000 in notes with $15,813.85? Plainly not; and yet this computation involves an assumption which we contest; it involves the assumption that Mr. Noyes retained in his possession, solely for the satisfaction of these notes, all moneys received by him between January, 1913, and November 26, 1913, and that he had no other outlet for those moneys. Where is the proof of all this? Upon what concrete fact does this bald assumption rest? If we realize that this record shows Mr. Noyes to be a business man with considerably more than a solitary business interest, abnormal penetration will not be required to appreciate that he would have many openings and outlets for funds in his possession, and that for him, as for all of us, money is highly volatile and particularly fluid. If, as we have seen, the burden of proof rests upon those who assert that these notes were paid off with moneys taken from the corporation, then no rule of law or logic forbids us from indulging the hypothesis and drawing the inference that, proof to the contrary being absent, the moneys received by Mr. Noyes prior to August 19, 1913, were dispersed in one or more of the various business, personal, domestic, social and/or charitable channels through which money is accustomed to flow; and this,

for the reasons *inter alia,* that the law never presumes wrong or fraud, or any step in aid of wrong or fraud, but it is presumed that the ordinary course and habits of life are pursued, and resolves all doubts against those seeking to trace these company moneys into the payment of these notes. If, then, we infer, as we must, against this complainant, that he has not established, because he could not establish, continued possession by Mr. Noyes of the funds received prior to August 19, 1913, we find the facts to be that, during the period when he was engaged in paying off these notes—from August 19, 1913, to November 26, 1913,—he received $7500 from the company, plus $2003.60 in royalties (if he did receive that $2003.60 between August 19, 1913, and November 26, 1913); how was he, then, to pay off $25,000 worth of notes with $9,503.60? But even this, however, is not fair to Mr. Noyes. Inasmuch as the period within which these notes were paid began on August 19, 1913, and ended on November 26, 1913, it follows that moneys received by Mr. Noyes subsequent to November 26, 1913, could not have been applied on these notes, because the notes were then already paid; and so far as moneys were concerned, that were received prior to August 19, 1913, we know that they aggregated only $17,000 (185), out of which $10,689.75 went to Osborn, and therefore not upon the notes, leaving a balance of $6310.25 only. No proof is made as to what became of this balance; no proof is made that it was still in Mr. Noyes' possession when he began to pay off these notes, or that, if it were, he applied it to that purpose; and in no way has this

balance, or indeed any other moneys, been identified into the payment of these notes. As we have already suggested, it is absurd to suppose that Mr. Noyes had no other outlet for moneys in his possession, except the payment of these notes; we all know that he was an active business man, that he was engaged in speculations in New York, that he was interested in several companies in California, and that he had, therefore, many outlets for his funds other than the payment of these notes.

In this connection, the following passage from a recent opinion is not without suggestiveness:

> "The plaintiffs wholly failed to trace their funds after they passed from their hands. Their only attempt to do so consisted of unconvincing evidence combined with an erroneous legal theory. Fulkerson testified that drafts such as were drawn against plaintiffs were 'generally made to transfer funds to reserve agents'. That was the only evidence on the subject. The drafts themselves were not produced, nor was any attempt made to identify the account in which they were deposited, or to show the state of that account between the time of the deposit and the date of the bank's failure. It is plain that this evidence falls short of the clear proof which the law requires: first, it fails to show that the fund was not dissipated. Fulkerson's statement that such drafts were generally used to transfer funds to reserve agents is insufficient. He was a discredited witness. He was engaged in many hazardous enterprises in which the funds of his bank were squandered. His evidence fails to show that plaintiffs funds were not used in that way. The drafts could have been easily traced and their actual use shown. Second, if the drafts were in fact deposited with reserve banks, the amount so deposited in specific banks should have been shown and then the state of that bank's account should have been followed down to the failure of the Alva Bank. Upon such a showing a trust might

> have been impressed upon the smallest balance remaining in the account at any time during the period."

And in this case, it was held that the idea that a trust fund may be recovered if it can be traced into general assets, was an "exploded notion"; and the necessity that "clear proof be made that the trust property or its proceeds went into a *specific fund,* or into a *specific identified piece of property"* (court's italics), was insisted upon. The court further points out that the rule does not admit the grouping of numerous accounts together as a single fund, and concludes the opinion with the remark that, "those funds may have gone into an account which was wholly wiped out. Again, all the accounts with his numerous correspondent banks were as distinct as separate promissory notes. Suppose Fulkerson had testified that sight drafts were usually invested in promissory notes, would a court of equity then treat the entire bills receivable of his bank as a trust fund? Certainly not. *The rule requires that the fund be traced to a specific note or notes" (State Bank of Wingfield v. Alva Security Bank,* 232 Fed. 847).

In the case at bar, there is no proof that Mr. William S. Noyes mingled with his own money any moneys taken from this corporation; to repeat the language of the Court of Appeals in New York, in this cause "it does not appear what became of the funds thus withdrawn" from the company *(Attorney-General v. North Amer. Life Ins. Co.,* supra); but the presumption that the trustee has paid out only his own funds in no way qualifies the rule that there must be a

specific thing, capable of being followed; and in this behalf, the following passage from a clearly reasoned Wisconsin case, cited as authoritative in *State Bank of Wingfield v. Alva Security Bank,* 232 Fed. 847, 850, may not be impertinent:

> "Since the decision of this court in the case of Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383, and In re Plankinton Bank, 87 Wis. 385, 58 N. W. 784, it must be regarded as settled in this state, at least, that, in order that the beneficiary or owner of a trust fund may be able to regain it out of the estate of a defaulting and insolvent trustee, he must be able to trace it into, and satisfactorily identify it in, the hands of the assignee or receiver of his estate, or its substitute or substantial equivalent; that when the trust fund has been dissipated, or so confounded and mixed up with the property and estate of the trustee that it cannot be traced or identified, there remains nothing to be the subject of the trust, and the owner of the fund or property is not entitled to prove for it as a trust debt, and obtain a preference over the other creditors of the insolvent estate, out of the property to which no part of the trust fund or property or proceeds of it is traceable. The right to so trace trust funds and regain them, has, it is held, its basis in the right of property. In Thuemmler v. Barth (decided herewith), 62 N. W. 94, the rule laid down in the former cases was reaffirmed and applied. When the trust fund cannot be identified or traced into some specific estate or substituted property, and the means of ascertainment fail, the trust wholly fails, and the party can only prove as a general creditor.
>
> "The court held that the facts stated warranted the assumption that the trust fund in question had been invested by the bank in, and formed a part of, the collaterals and securities in the hands of the receiver, but what particular collaterals or securities of those received by him is not indicated. And it is upon this ground that the judgment against the receiver, as such, appealed from, has been rendered. Instead of requiring the petitioner to ascertain and identify the trust fund as

existing in some specific, changed, or substituted property or estate, the judgment makes the claim of the petitioner a trust debt or preferred demand against all the collaterals and securities which came to the hands of the receiver, whether taken before or after the deposit of the fund claimed, notwithstanding the fact that very many others are entitled to claim, as we have seen, very large sums, and to trace the same into the same collaterals and securities, so far as they may be able; and some of them may succeed, perhaps, in making the necessary proof for that purpose. There is quite as much to justify the conclusion that the fund in question was paid out to creditors of the bank as that it was invested in collaterals or securities which came to the hands of the receiver; and, if it had been so paid out, that fact would afford no ground for charging the assets of the bank with the debt, as a trust demand or preferred claim, as was clearly shown in Silk Co. v. Flanders, supra. The judgment appealed from rests upon the ground that it is to be presumed that the bank paid its creditors and its expenses out of its own money, and that its investments in the securities and collaterals represent only this particular trust fund, rather than the large amount of other claims of like character. It may well be that others having such claims may succeed in tracing their trust funds into these identical securities; and in that event it may transpire that the court, by its judgment, has awarded to the petitioner, without definite proof of ownership, that which in equity really belongs to others. The court had nothing before it to show that such was not the case. If the several trust funds had been in a deposit box of the bank, with funds of others, but in one gross sum or mass, when the suspension occurred, there could be no difficulty in awarding to each his own; but none of the trust funds remained. When a trustee mingles trust money with his own, in a bag or box or bank account, the right of the beneficiary attaches, to have all that belongs to him out of the bag, box or account, and whatever the trustee may take out will be deemed or presumed to have been taken from his own, instead of the trust, funds; but when the money in the bag, box, or account has all been drawn out, and there is no evidence to show

what has been done with it, or with the trust portion of it, there is no presumption that the trust funds, to any extent, are included or represented in securities, the legal title to which is vested in the bank. The presumption that the trustee has paid out only his own funds in no way qualifies the rule that there must be a specific thing, capable of being followed. If the trust funds which the bank had, had been invested by it from time to time in various city lots or farms, the title to which had been taken in the name of the bank, and the owner of a part of such funds assumed to ratify the act by which his money had been invested, as he well might, and claim the property purchased with it, or to repudiate it, and enforce a claim for his money against the land so purchased with it, it seems plain that he could not do either unless he could show what particular part of such real estate had been purchased, in whole or in part, by, and represented, his money; and, not being able to do this, it is clearly impossible to maintain that without such proof he could exercise either of these rights against and in respect to all the lands generally, so purchased from time to time with the trust funds owned by himself and by others. In like manner, in respect to these securities, there is no evidence to show whether any of the moneys claimed by the petitioner were invested in them, or in any particular part of them; and as the right to trace his trust fund is founded on the right of property, and not on the ground of compensation for its loss, he must be able to point out the particular property into which the fund has been converted. When he is unable to do this, the trust fails, and his claim becomes one for compensation only, for the loss of the fund, and stands on the same basis as the claims of general creditors. The rule in the administration of insolvent estates is that equality is equity, and the burden of proof is on the claimant to show the facts which entitle him to claim as owner, and not merely as a creditor. The receiver represents all the creditors, in a general sense; and the presumption, in the absence of proof, as between different claimants, is in favor of equality of right. The petitioner has shown no facts entitling him to the securities in question to the exclusion of other owners of trust funds similarly situated.

While the owners of one or more trust funds may trace their money into specific property purchased with them, or it may be in part with them and funds of the trustee, each party, in order to assert and enforce his equitable rights as owner, can do so only upon proof of the amount contributed by each, of their respective funds, in the purchase. Each claimant is entitled to his own, but only upon clearly identifying it; and, failing to do this, he cannot be allowed to take property which equitably belongs to others, to make himself whole. He cannot maintain his position as owner by merely showing facts which entitle him to the position of a mere creditor. The subject under consideration is discussed with great clearness and ability in the case of Slater v. Oriental Mills (R. I.) 27 Atl. 443, and the reasoning there adopted seems to be conclusive against the petitioner's case. The court will go as far as it can in tracing and following trust money, but when, as a matter of fact, it cannot be traced, the trust and equitable right of the beneficiary to follow it fails. Under such circumstances, if the trustee has become insolvent, the court cannot presume, in the absence of proof, that the trust money is to be found somewhere in the general estate of the trustee, or somewhere in a quite general part of his estate of a certain character that still remains, and proceed to charge it accordingly. (Citing case.)

"And where the trust fund, as in this case, cannot be traced, and the substituted property into which it has entered specifically identified, the trust fund must be regarded as dissipated, within the meaning of the authorities,—scattered, dispersed, and, as such, destroyed. And this is the logical result of the case of Silk Co. v. Flanders, supra, and other subsequent cases in this court. This is in harmony with the great weight of modern authority. (Citing cases.) For these reasons, we hold that the petitioner wholly failed to show himself entitled to the judgment he obtained. The judgment of the Superior Court is reversed, and the cause is remanded for further proceedings according to law."

Burnham v. Barth, 62 N. W. (Wis.) 96, 99.

Even if the case made by the complainant exhibited proof of simultaneity between the purchase of Section 5, and the receipt of the moneys from the corporation, this would not establish either that the one fact was the consequence of the other, or that the purchase was made with the money received; but there was no such simultaneity; the acquisition by Mr. Noyes of the controlling interest in the Silver Hill Company, and the making of his personal notes—the pledging of his personal credit—were practically contemporaneous; but, according to the claim of this complainant, a year or a year and a half intervened between the execution of the notes and their payment. It cannot, we submit, be denied that a year or a year and a half was ample time within which Mr. Noyes could have arranged payment of these notes from sources other than money taken from this corporation, and/or otherwise disposed of the moneys "taken from the corporation"; and this complainant has failed conspicuously to show that he did not do so. There is in this record simply no proof that one dollar of any money received by Mr. Noyes from the corporation was expended in the extinguishment of these notes; there is not a syllable of tangible evidence, not a witness, not a document, which could authorize even the most hysterical zealot to draw that conclusion; the production upon this point of moral certainty in an unprejudiced mind has not been generated by the complainant.

The theory of the complainant requires that moneys taken from this corporation should be clearly traced into the payment of these notes. If the moneys of the

corporation went into other channels, if the notes were paid with funds derived from sources other than this corporation, complainant's theory crumbles; and as we have seen from the authorities, it is indispensable to the maintenance of that theory, not only that corporate moneys which were in Mr. Noyes' hands a long time before the note was paid, were still in his hands when the notes were paid, but also were actually applied by him to the payment of those notes,—anything short of this leaves the complainant without a case. As remarked in the *Leigh* case,

> "the facts relating to the handling of this trust fund are quite complicated, and need not be stated because the evidence does not clearly show that this fund is still in existence. The money which Leigh paid the Beam Company on the execution was not its money, but his own, which he had paid himself as salary. Nor does it sufficiently appear that the trust fund, of which Leigh had control a long time before, was still in his hands."
>
> *In re Leigh,* 208 Fed. 486, 487-8.

The facts here show that ample time intervened to permit Mr. Noyes completely to dissipate the corporate money and to have arranged to obtain the money for the notes from wholly independent sources, from sources unknown to the corporation. Money is perhaps as fluid a quantity as exists. It can be expended in large amounts in the briefest of times; in these respects it differs noticeably from much that moves in the world's commerce; and there is no inherent improbability which discounts a theory involving the rapid movement of money. And, of course, the further proposition still remains, and remains without a syllable of proof to meet it, that the fact that Mr. Noyes

had corporate money in his possession when the notes were paid is no proof whatever that the notes were paid with that corporate money—a proposition quite independent of any coincidence of the time of receipt and disbursement. As observed by the Court of Appeals of New York:

> "To follow money into lands, and impress the latter with the trust, the money must be distinctly traced and clearly proved to have been invested in the lands. While money, as such, has no earmark by which, when once mingled in mass it can be traced, it is, nevertheless, capable under some circumstances of being followed to, and identified with, the property into which it has been converted; but the conversion of the trust money specifically, as distinguished from other money of the trustee into the property sought to be subjected to the trust, must be clearly shown. It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property—that is, payment for property generally by the trustee, does not authorize the presumption that the purchase was made with trust funds."
>
> *Ferris v. Vanvechten,* 73 N. Y. 113, 119-120.

There is, we submit, no legal incongruity in the application, in cases of similar impression to this, of the standard rules as to the following of trust funds *(39 Cyc.* 556; *Ry. Co. v. Trust Co.,* 204 Fed. 546); and the general doctrine is clearly explained by Gilbert, C. J., in the frequently cited case of *Spokane County v. First National Bank,* 68 Fed. 979, where the conclusion was reached that

> "both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his funds may depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant."

In the light of this general doctrine, then, one may well inquire as to what there is in this record to identify the fund sought to be traced by this complainant. Equity ceases its pursuit when the means of identification fail; even if we go the length of assuming that, under the specific facts of this particular case, Mr. Noyes was a fiduciary who had received trust funds from the Presidio Mining Company, still, this record would be barren of proof identifying the moneys that paid these notes with those trust funds; there is not a syllable of proof to show what Mr. Noyes did with those funds after he received them; there is not a syllable to show that he commingled or mixed them with any specific fund or funds of his own; and as the record establishes, the proof is all one way as to the sources from which he derived the moneys that paid off the notes—the only proof upon the point is that these notes were paid off with moneys, not one penny of which came from the Presidio Mining Company. In a word, the fund attempted to be traced is not identified. No proof is made that the notes were actually paid with company funds. No proof is made that they were not actually paid with wholly independent funds, as testified to by Mr. Noyes without contradiction; and the claim of complainant that company money paid off these notes is plain nude assertion. It does not seem to occur to this complainant that he should give a better account of the mode in which he reached his opinions than merely that it is his pleasure and interest to hold them, that there is a difference between assertion and

proof, that an interested desire does not always prove a fact, that a fact does not always prove a theory, that two contradictory propositions cannot be undeniable truths *(impossibile est idem simul esse et non esse)* that to beg a question is not the way to settle it, or that when an objection is raised it should be met with something more convincing than vociferous assertion. And one's mind recurs to the language of the Circuit Court of Appeals *In re Brown,* 193 Fed. 24, 29, affirmed 232 U. S. 707, to the effect that

> "we cannot assent to the proposition that he may trace his money into any specific fund or security merely by inferences, based on presumptions without substantive testimony to sustain them."

We respectfully insist that all trace of the moneys received by Mr. Noyes from this corporation was lost when those moneys entered into the general mass of his estate; no bank or other institution is designated as a connecting link between the money received from the company and the money paid on the notes; this complainant specifies no peculiar facts which point to the money that paid the notes as an identified *res;* and where the proof fails to show that any of the funds of the company, either in their original, commingled, mixed, substituted or any other form, were applied by Mr. Noyes to the payment of these notes, any trace or identification of these funds is impossible *(In re Larkin and Metcalf,* 202 Fed. 572, 581; *In re A. D. Mathews Sons,* 238 id. 785). We respectfully insist that the rule whose requirements must be satisfied by this complainant is not one to be met by

doubtful, uncertain or ambiguous evidence; all doubts, as we have seen, are to be resolved against those in the situation of complainant; the proof of identification must be "reasonably specific" *(In re Hollins,* 219 Fed. 544, 546); the mere tracing of corporate funds into the general assets of Mr. Noyes is wholly insufficient *(In re Mathews,* 238 Fed. 785, 787); there must be clear and specific proof that these very funds paid off these very notes *(Bank v. Bank,* 232 Fed. 847, 849); and by this proof the moneys that paid off the notes must be clearly traced and identified *(In re See,* 209 Fed. 172, 174; *Zenor v. McFarlin,* 238 id. 721, 725). Not only is it not enough to show that the money received from the company went to swell Mr. Noyes' general estate, but as observed during an application of the principle in a recent case:

> "It is not sufficient for the plaintiffs to show that such property was purchased from a fund which once contained plaintiff's money, without showing also that plaintiff's money wholly or partly was used in paying for it. The burden is on the plaintiffs to point out the specific property and trace the plaintiffs money into the purchase money of it. It does not suffice to show that it went into some of the bankrupts' property that came into the possession of the trustee without pointing out what it is. It is not sufficient to aver that it went into the assets generally, or, what amounts to the same thing, specify separately the entire assets in the possession of the trustee as those into which it is claimed to have gone. The bill, it seems to me, may aver more than one item of property in the alternative to allow for a possible failure of proof, if one alone were relied upon; but it must point the specific property into which the money is to be

traced, and the proof must show that it went to purchase that property."

Knauth et al. v. Lovell, 212 Fed. 337, 338-9; and see also

U. S. Nat'l Bank v. City of Centrallia, 240 Fed. 93.

Hence, according to the case of the complainant an importance which it does not deserve, we find no concrete evidence to support the theory that these notes were paid off by money taken from the corporation; and when upon analysis of the record, we find the contrary theory sustained by both oral and documentary evidence, it surely cannot be claimed that the first of these theories should judicially be found to be true. If the evidence as to the source from which came the money that paid off these notes is equally consistent with two theories—that the money which paid off the notes was taken from the corporation, and that the money which paid off the notes came from sources, personal to Mr. Noyes and wholly disconnected from the corporation—it establishes neither theory; in other words, if it be conceded, purely for argumentative purposes, however, that the evidence was as consistent with one of these theories as with the other, yet this would not assist these complainants to satisfy the burden that the law places upon them, because as observed by the Circuit Court of Appeals for the Eighth Circuit, "if the facts are consistent with either of two opposing theories they prove neither" *(U. S. Title Co. v. Des Moines National Bank,* 145 Fed. 273). But, as already observed, the evidence was not as consistent

with one theory as with the other; on the contrary, it was entirely opposed to the complainant's theory and entirely favorable to the contrary theory; it was of a highly persuasive type because of its circumstantiality, its documentary corroborations, and the ease with which, if untrue, it could have been contradicted; and it was evidence that was wholly unassailed and unimpeached. And this evidence had the support of every relevant presumption. If we know that certain notes have been paid, if we know that they were paid from either of two funds, if it were wrong so to use one of these funds, but not wrong so to use the other, and if we were left uncertain as to the identity of the particular fund that was used to pay the notes, then, assuming the absence of direct testimony, should we not be guided in our inferences by the presumption that a person is innocent of crime or wrong, that a person takes ordinary care of his own concerns, that official duty has been regularly performed, that private transactions have been fair and regular, that the ordinary course of business has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life, and that the law has been obeyed *(California Code of Civil Procedure,* Section 1963, subdivisions 1, 4, 15, 19, 20, 28, 33); and if not, of what utility are these provisions of positive law? How then can we honestly say that this complainant has established that the funds which paid off these notes came from the source designated by him? On the contrary, did not Mr. Noyes, whose standing was and is quite as good as that of any per-

son whomsoever who testified for complainant, who was making no assertion that was not either admitted or proved to have been well founded, and on whom rested no obligation to designate the source from which the money came, fully and clearly, without contradiction, and documentarily, and otherwise corroborated, point out just whence were derived the moneys that paid off these notes?

11. At the time of the acquisition of Section 5 by Mr. Noyes, the Presidio Mining Company had no such right, title, interest, estate or expectancy in that section, or relation with the Silver Hill Mill and Mining Company, as would justify it in making any claim upon that section, or upon Mr. Noyes in respect of that section, whether in the way of impressing any trust upon that section in its favor or otherwise.

The historical facts apparent from this record demonstrate that during the fall of 1912, and up to January 29, 1913, the Presidio Mining Company had no present rights whatever as against the Silver Hill Mill and Mining Company, nor any rights in expectancy as against that company, or in connection with Section 5. Even if the Presidio Mining Company were not trembling on the brink of bankruptcy from which it was plucked back by the installation of the cyanide plant, even if it did not have an impoverished treasury, even if it were not necessary that the cyanide plant should have been constructed upon credit, and even if the Presidio Mining Company did have abundant resources of its own, still it had no such relation to Section 5 as would make those resources material. No negotiations of any character were in progress between the two com-

panies; there was no agreement of any sort between them; and since no lease was in existence the Presidio Mining Company was not then even a tenant of the Silver Hill Company so as to put forward a claim to the expectancy of a renewal,—it had no "expectations" whatever; certainly, it had no rights predicated upon any intention of William S. Noyes as to the future, because, as observed in a Maine case,

> "he (the president) had a right to buy the farms for himself, and afterwards sell them to the company. His intention to do so did not make them trust property."
>
> *Camden Land Co. v. Lewis,* 63 Atl. (Maine) 523, 530.

And as remarked in an Iowa case:

> "It is evident that a mere intention on the part of Cahoon that Francis should have the land, or a desire on the part of Miller that after his daughter acquired it she should convey it to Francis would not establish a trust, which Francis could enforce. The title could not have been procured by Francis without the affirmative intervention of his mother and her action in procuring on her own responsibility the $500 from Beck; and the sole question as we think is whether Mary Racine entered into an affirmative obligation to hold the title received by her for Francis. There was no written evidence of any such obligation such as is required by the statute of frauds and there is no affirmative evidence of a parole agreement on her part to so hold the title made to or in behalf of Francis as an inducement to him to convey to her the title such as would give rise to a constructive trust. The most that can be said is that she expressed a purpose or intention that at some future time, after the mortgage should be satisfied, she would convey it to Francis as a provision for him. Other witnesses besides the brother and sister already referred to, who speak of an arrangement made in the family, testify to declarations on the part of Mary Racine that she intended the land for

> Francis; but the declarations do not, when fairly considered, amount to more than an explanation of a purpose ultimately to give it to him. It is, of course, too clear to justify citation of authorities that, unless some trust obligation rested upon Mary Racine to hold the land for Francis, proof of mere declarations of an intention to give it to him will not warrant the enforcement in equity of a conveyance. * * * We think the only conclusion which the evidence justifies is that Mary Racine acquired title to the land in controversy in part by money furnished to her for that purpose by her father, and as to the residue by applying to the satisfaction of the Beck mortgage the proceeds of the farm which she carried on by the assistance of Francis and his brother with the intention on her part to ultimately convey to Francis, which intention she was under no legal or equitable obligation to carry out."
>
> *Henninger v. McGuire,* 125 N. W. (Iowa) 180, 183-4.

And so, also, not to multiply authorities unnecessarily, it was held in a Colorado case that even where the directors of a mining corporation purchased property by an agreement in writing binding themselves to convey such property within five days to the corporation, and openly stated that they expected and intended so to convey it, they did not thereby become trustees of the property for the benefit of the company and its stockholders. And while in the course of the opinion the court pointed out that:

> "It is strenuously insisted by plaintiff that when the individual defendants purchased the property from him and his associates they did so as trustee for the Portland company, and that they held the property in trust for it and its shareholders",

still, said the court,

> "We cannot view this in any other light but as a question of fact, and a great weight of the evidence, circumstantial and otherwise is to the contrary";

and the court held that while it was true that the purchasers openly stated that they expected and intended to convey the property to the Portland company, still that alone would not make them trustees. If the Presidio Mining Company entertained any such expectation as that Mr. Noyes would allow it to share in the benefit of Section 5, such expectation would not raise any trust to that effect; because

> "it must appear from the entire transaction that there was *an obligation* on the part of the holder of the legal title to hold it for the benefit of someone else."
>
> *Vickers v. Vickers,* 65 S. E. (Ga.) 885.

As a general proposition, it may be said that

> "no mere oral declarations, representations or promises made by defendant after he had acquired by purchase with his own money the property of which plaintiff's intestate had been regularly and without fault of defendant divested prior to his purchase, could impress a trust thereon"
>
> *(Perreau v. Perreau,* 12 Cal. App. 122, 126)
>
> "nothing subsequently said will create such a trust"
>
> *(In re Clarke's Estate,* 79 Atl. (Pa.) 246).

In point of fact, the Presidio Mining Company did not during the fall of 1912, or indeed at any other relevant time up to January 29, 1913, have even the expectancy which is referred to and discussed in *Robinson v. Jewett,* 22 N. E. (N. Y.) 224. It had no present interest which entitled it to the immediate pos-

session of the property and the future profit *(Civil Code,* Secs. 689, 690); it had neither a vested nor contingent interest in the property *(Civil Code,* Secs. 694, 695); and it possessed no such interest even, as is referred to in Section 700 of the California Civil Code. Under these conditions, it may not be inappropriate to observe that not only did William S. Noyes not acquire Section 5 in trust for the Presidio Mining Company, but no trust relation existed between him and that company in respect of the acquisition of Section 5; and hence Mr. Noyes breached no duty or trust to the company in acquiring Section 5 for himself, or in failing to acquire it for the company. In acquiring Section 5, it is submitted that any duty that Mr. Noyes would be under would be merely co-extensive with any trust then existing between him and the Presidio Mining Company as to Section 5; and if there were no trust, there would be no duty. As observed by the Supreme Court of Alabama:

> "A different case is presented in the alleged purchase of Martin's one-third interest. When bought by the Lagardes, that property was held by a title distinct from the tertiary interests, held by the complainant and Christopher, respectively, and in it the complainant had no property or right. No expectancy of value springs from the alleged fact that complainant 'has been negotiating for and endeavoring to purchase' that interest at divers undesignated times. It does not appear that the Lagardes had been authorized to conduct such negotiations, and whether they would ever have been resumed is merely conjectural. Proprietorship of the Martin property may have been important to the corporation, but it is not shown to be necessary to the continuance of its business, or that the Lagardes' purchase in any way impaired the value of the corporation's property. In

such case it is immaterial that knowledge of the situation was gained by the Lagardes through their connection with the corporation, since no breach of duty is traceable to such knowledge. The duty is only co-extensive with the trust, so that in general the legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purpose of its creation. An example of the latter class of cases is found in Blake v. Railroad Co., supra, where persons who were directors in the railroad company bought rights of way along its projected route; also in Averill v. Barber, 6 N. Y. Sup. 255, where persons occupying a like position obtain certain patent rights, to work under which was the purpose for which said corporation was formed. Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit, enterprises or investments, which, though capable of profit to the corporation, have in no way become subjects of their trust or duty."

Lagarde v. Anniston Lime Co., 28 So. (Ala.) 199, 201-2.

It should be observed that the Presidio Mining Company was organized in 1883; and that barring the abandoned contract with the Cibolo Company, it had devoted all of its energies to the development of Section 8, its own property. It was not organized either to acquire or to operate Section 5. For very many years prior to the fall of 1912, it had been in existence and operation without stirring a finger to acquire Section 5; and a continuance of that non-ownership would merely be a continuation of conditions which had already

existed for many years past, and which, especially in view of the cyanidation, would not defeat the purpose for which the company was formed. This suggestion may be illustrated by the ruling in *Averill v. Barber,* 6 N. Y. S. 255; that case took the ground that if one is under duty or obligation to acquire property for the company of which he is a director, he cannot acquire such property for his individual benefit,—a position which in and of itself assumes that one may be a director of a company, but still under no duty or obligation to acquire property for the company. In other words, it is the presence or the absence of the duty or obligation which determines whether the director can or cannot acquire the property for his individual benefit; if the duty or obligation exists, he cannot so acquire the property; but if the duty or obligation should not exist, then no rule of corporation law with which we are familiar, would prevent the director from acquiring the property in question for his individual benefit. But in *Averill v. Barber,* an actual agreement to transfer the asphalt patents to the company was established by uncontradicted testimony, and the directors were bound to transfer them to, or hold them for, the company which was organized to work under them; and in this connection, the learned judge at special term made the significant remark that:

> "had the patents not been those under which the American Company was to operate, a different question might be presented; but there can be no doubt that they were acquired by the company, and that it was supposed by all, when that company was organized, that those very patents were or would become its property."

But what testimony in this record establishes that the Presidio Mining Company was organized to work Section 5? What testimony exists here to establish that, in view of the erection of the cyanide plant, Section 5 could have been acquired by the Presidio Mining Company? What particle of evidence in this record makes it clear "that it was supposed by all, when that company was organized", that Section 5 was or would become its property? When, if you please, since its organization, did the Presidio Mining Company appoint an agent for the purpose of securing title to Section 5? When, during all of the years which intervened from 1883 down to the commencement of this action, did the Presidio Mining Company ever declare its intention to acquire Section 5? And with particular reference to the fall of 1912, how could the Presidio Mining Company, with its impoverished treasury, and with the alternative of utter ruin or a cyanide plant established upon credit, staring it in the face, hope, intend, expect or propose to acquire Section 5? If the Presidio Mining Company had been specifically organized for the purpose of acquiring and working Section 5, and if Mr. William S. Noyes being a director of that company, and knowing of this purpose, had surreptitiously acquired the title to Section 5, one could understand why he should be charged as a trustee; but between that state of facts, and the state of facts revealed by the evidence in this cause, the widest and most absolute divergence exists. And so, in *New York Automobile Co. v. Franklin,* 97 N. Y. S. 781, where *Averill v. Barber,* supra, was discussed, the court used the following significant language, at page 787:

> "In Averill v. Barber the defendants were directors of the American Company, and the court says: 'It is not necessary to cite authorities to the proposition that, *if they were under a duty or obligation of any kind* to get control of the patents' involved in the litigation 'for the benefit of the American Company, they could not do so for their individual benefit'. This must, of course be conceded. It then proceeds to discuss the question *whether there was any such duty or obligation*, and under the peculiar circumstances of that case, it holds that there was."

And so, in the cause at bar, our contention is that there was no duty or obligation of any kind upon the part of Mr. Noyes to get control of Section 5 for the Presidio Mining Company during the fall of 1912, and that under the circumstances of this case, no court should hold that there was any such duty or obligation. And further along on the same page, the learned court remarks:

> "In other words, these cases all hold that, if a director or trustee violates the duties which he owes to the corporation, the courts will intervene. But, in this case, I expressly hold that no such rights or duties were in fact violated."

And that is precisely what the defendants in this cause claim. They claim that no such right or duty was in fact violated. As we have repeatedly urged, Mr. Noyes during the fall of 1912, while a mere "salaried employee" of the Presidio Mining Company, was under no duty or obligation of any kind to pledge his individual credit and risk his individual resources to acquire control of Section 5 for a mining company, whose fiduciary he was not, which was not organized to acquire Section 5, which had never expressed any in-

tention to acquire that section, which had never negotiated with any person for the acquisition of that section, and which was then financially incapable of acquiring the section even if it had the intention to do so; and if no such duty or obligation rested upon Mr. W. S. Noyes, his conduct in acquiring control of Section 5 was not a violation of any duty or obligation which he owed to the Presidio Mining Company. The Presidio Mining Company never authorized Mr. William S. Noyes to purchase Section 5 for it; the Presidio Mining Company never authorized any person to acquire Section 5 for it—it had neither the intention nor the means to acquire that section, tottering as it was upon the brink of utter ruin and bankruptcy from which the cyanide plant alone ultimately saved it. Mr. Noyes was never authorized, employed or requested, at any time, by the Presidio Mining Company to negotiate for the purchase of Section 5 for it, nor did the Presidio Mining Company ever part with one dollar in reliance upon any acts or declarations of Mr. Noyes relating to Section 5.

Not only was the Presidio Mining Company not organized to operate Section 5, but in the fall of 1912, it was financially incapable of acquiring Section 5. Its condition at that time was precarious. The quality of the ore in Section 8 was depreciating; the price of silver was depreciating; the pan-amalgamation method was inefficient to treat the low grade ore then being mined from Section 8; the establishment of a cyanide plant, and that too upon credit, was necessary to make those low grade ores profitable; it was plainly cyanide

or bankruptcy; and with the cyanide plant, the company could have continued its enterprise of mining Section 8, and Section 5 would become wholly unnecessary to its continued existence. In the fall of 1912, the Presidio Mining Company had neither the ability nor the intention to purchase Section 5; not the ability, because what funds it had—and they did not exceed five or six thousand dollars—were needed for the installation of the cyanide plant which, alone, could rescue the company from final destruction; not the intent, because its whole thought was centered upon the cyanide plant, because it never entertained the thought of purchasing Section 5, and because whenever the suggestion for the purchase of Section 5 was made, it was always rejected. It nowhere appears that the Presidio Mining Company expected to expend on Section 5 any money which it would otherwise not have spent, or that it incurred any liability with respect to Section 5 upon the *bona fide* belief that it was able to purchase that section; nor does it appear that the Presidio Mining Company borrowed any money, or increased its indebtedness, or had become obligated to others in any way upon the credit of its ability to become the owner of Section 5. The testimony of Mr. B. S. Noyes, which is wholly uncontradicted, and the statements contained in the Klink report fully support the statements which have just been made.

But not only was the Presidio Mining Company not organized to operate Section 5, not only was the Presidio Mining Company financially unable to acquire Section 5 in the fall of 1912, but the installation of the

cyanide plant rendered Section 5 unnecessary to the Presidio Mining Company. True, prior to the installation of this plant,—which by the way began its operations in July, 1913,—the Presidio Mining Company was in a desperate way; silver was declining; the section was turning out low grade ores; the pan-amalgamation method was too expensive to work these low grade ores at a profit; and the installation of the cyanide plant became a vital necessity. But, with the installation of the cyanide plant, which very materially reduced the cost of extraction of silver, the low grade ores of Section 8 again became profitable, and to paraphrase the language of a federal circuit judge, "the company was not seeking to acquire, and did not need for its business, the land at Section 5 which Noyes bought". And that the installation of the cyanide plant was advisable, and that the event proved the wisdom of this improvement, Mr. Klink's report plainly demonstrates. Even if the directors of the Presidio Mining Company, pursued a mistaken business policy in establishing this cyanide plant, still to cry fraud upon such a basis as that would obviously be untenable. In the federal opinion just referred to, the learned judge, among other things said:

> "Neither was there any trust ex maleficio. Captain Ford was neither a director nor an officer of the company. The fact that he was a stockholder did not preclude him, acting in good faith, from going into another and independent corporation or partnership organized to prosecute the great industry of making plate glass. He was not the agent of the Pittsburg Plate Glass Company for any purpose, nor was he acting in any fiduciary capacity for that company. The company was not seeking to acquire,

and did not need for its business, the land at Tarentum which Ford bought."

Barr v. Pittsburg Plate Glass Co., 51 Fed. 33, 37; affirmed on appeal, 57 Fed. 86.

12. The acquisition of Section 5 by Mr. Noyes not only operated no detriment to the Presidio Mining Company but was beneficial to that corporation.

In addition to the foregoing considerations, it should be pointed out that no injury or detriment has accrued to the Presidio Mining Company by reason of the acquisition of Section 5 by Mr. William S. Noyes. After the installation of the cyanide plant, Section 5 was not necessary to the continued existence of the Presidio Mining Company, because the cyanide plant enabled that company to operate Section 8 at a profit; on the other hand, while Mr. Noyes acquired Section 5, as he had the plain right to do, yet he did not acquire it from the Presidio Mining Company, or in violation of any right that the Presidio Mining Company had in Section 5. What benefit, then, did he acquire from the Presidio Mining Company, or what detriment did he cause that company arising out of his acquisition of Section 5? Let us assume that he leased Section 5 to the Presidio Mining Company for half the net profit; still, the hypothesis is not shown to be unreasonable that if this experienced mining engineer had worked Section 5 himself, he would have done better than one-half the net profit—he might still further have reduced the operating expenses and still further increased the profit; and there is no proof here that he might not. Indeed, it has not been established here by the complain-

ant that there ever existed any intention on the part of William S. Noyes to use Section 5 to the injury or detriment of the Presidio Mining Company; or, to paraphrase the language of *Barr v. Pittsburg Plate Glass Company,* "there was no intention on the part of Mr. Noyes to run Section 5 as rival works, or to the detriment of the old company" (51 Fed. 33). On the contrary, the letter of January 23, 1913, introduced as an exhibit by this complainant, shows, when fairly read, the anxious regard of Mr. Noyes for the welfare of the Presidio Mining Company (Record, vol. 2, p. 537). And to adopt a further suggestion made in the Barr case, it must be remembered that Mr. Noyes was a stockholder himself in the Presidio Mining Company, and that it is therefore unreasonable to infer that he should desire to injure that company by any antagonistic or hostile use of Section 5. In the *Barr* case, the learned judge, after referring to the fact that Capt. Ford was a large stockholder in the glass company, and that his two sons were also stockholders therein, observed that "it would be unreasonable to suppose that he intended to injure the company" (51 Fed. 34 *ad finem*); and so again, in speaking upon this topic, the learned judge further said:

> "The Pittsburg Plate Glass Company did not have and could not expect to maintain a monopoly of this growing industry. That the building of the Ford City Works was in itself 'a menace', to that company is an unwarrantable assumption. Moreover, those works were in friendly hands. It is incredible that the defendants would have run them to the prejudice of a company in which they had interests so large."

And so in the same case on appeal, the Circuit Court of Appeals, speaking of Mr. Ford, remarked that:

> "He desired to establish other works for the purpose of extending the business which produced such a profitable return, to be operated in harmony with Creighton, and not to his injury; and being a stockholder of the Pittsburg Plate Glass Company did not deprive him of the right to do this. His two sons were also stockholders and it would be unreasonable to suppose that he intended to defraud or injure a company in which he and his sons were so largely interested. * * * The interests of the defendants in the Pittsburg Plate Glass Company were so large at this time as to exclude all idea of their intention to depreciate their value, or to diminish their profits. On the contrary, they had the strongest motives to protect their interests, to make them still more profitable and to ward off competition as long as possible. Having purchased the required land, they proceeded to build the works with their own capital and on their own credit, with the knowledge of and without objection from the plaintiff or any other minority stockholder."

And not only has Section 8 not been in any way impaired by the purchase by Mr. Noyes of Section 5, but the result of the transaction as a whole has been favorable to the Presidio Mining Company. That the various transactions which have occurred between Mr. Noyes and the Presidio Mining Company have, upon the whole, been favorable to the Presidio Mining Company is affirmed in the Klink Bean Report (answer to defendants' suggestions numbers 6 and 7); and to adopt the language of the Supreme Court of New York, "the company got all it bargained for, and, judging from results, it got a good bargain" (*Burden v. Burden Iron Co.,* 80 N. Y. S. 390, 398). Again, to paraphrase the language of the *Barr* case, "the contract, indeed, had

really proved to be a beneficial one to the Presidio Mining Company, a rescission was not desirable on the part of that company'' (51 Fed. 33, 37); and to employ the language of the Circuit Court of Appeals in the same case:

> ''The purchase of the Ford City Works, up to the close of the evidence as set out in the record, has been highly advantageous and remunerative to the Pittsburg Plate Glass Company. * * * The Tarentum and the Ford City Works were the property of the defendants, and were bought by the Pittsburg Plate Glass Company with a full knowledge of all the circumstances under which they had been erected, and it is evident that the company has not been injured, but has been greatly benefitted by their acquisition (57 Fed. 86, 97, 98).

13. The foregoing features of the cause at bar should, we submit, be considered not discretely, but cumulatively.

The foregoing indicia of fair dealing upon the part of Mr. Noyes, are not intended to be exhaustive, because other illustrations, specific in character, as distinguished from general inferences, will be found in the record. Some of these illustrations are particularly forcible, intrinsically considered; others are not only intrinsically convincing, but acquire an added force from their relation to other facts and circumstances; because it must never, we submit, be forgotten, that here, as in other departments of the law, even if a given fact, in and of itself, standing alone and unconnected with other facts and circumstances, might not be sufficient, yet it may, from and by its association with other facts and circumstances—regarded cumulatively, so to speak,—become of pregnant consequence; and that the evidence should be considered, not by fragments or

disconnectedly, but in its entirety and as a whole, one part explaining and illustrating the other, is one of the most familiar rules of the law.

14. No trust can be impressed upon Section 5 in favor of the Presidio Mining Company, because of the geographical proximity of that section to Section 8.

Does the accident of the geographical proximity of Section 5 to Section 8, the circumstance that the joint operation of these two sections would be convenient, or desirable, to the Presidio Mining Company, and the asserted familiarity of William S. Noyes with the geology and "probable" location of ore deposits on Section 5, operate to inhibit his purchase of the section, or to impress a trust upon him if he does purchase it? And if so, upon what intelligent principle is this result accomplished? Is it accomplished regardless of the inability or intention of the Presidio Mining Company to acquire the section? Is it to be accomplished regardless of the circumstance that it was the energy, credit and funds of William S. Noyes which acquired the section? We respectfully urge that the proposition that a trust of any sort can be impressed upon the property by reason of its geographical position is as novel and as unintelligible as the claim that there is any duty on a director or other officer or employee of a corporation to borrow money for it upon his own, individual responsibility. We respectfully insist that trusts cannot be impressed upon real property upon any consideration of geographical proximity, desirableness of location or convenience of user; if such things could be, each prospective purchaser would be contented to pay a premium

for a detached island. If we assume that the convenience of Section 5 for user in connection with Section 8 were a fact as blatant to this company as it was to every intelligent man who devoted a moment's thought to the situation, still, that fact could inject no evil into Mr. Noyes' purchase, particularly when we consider the hopelessness of any purchase by a company rapidly drifting into bankruptcy. We submit that the fact that a stockholder out of his own credit, with his own funds, purchases from a stranger a parcel of realty adjacent to that owned by his corporation—a parcel that his corporation was helpless to purchase, that it had no intention to purchase, that it was not organized to operate, and as to which it had no plans whatever with which such purchase could interfere in any way,—gives rise to no trust whatever in favor of the corporation; something more than this is necessary to furnish the foundation for a trust,—certainly, no trust can be established upon Section 5 merely because it might be convenient or desirable to the Presidio Mining Company.

As to the knowledge which Mr. Noyes may or may not have had concerning Section 5, it is enough to say that it is not the source or extent of the information, but the use to which it is applied which is important in such matters. Thus, in the *Lagarde* case, the court observed that

> "proprietorship of the Martin property may have been important to the corporation, but it is not shown to be necessary to the continuance of its business, or that the Lagardes' purchase in any way impaired the value of the corporation's property. In such case, it is immaterial that knowledge of the situation was gained by the La-

> gardes through their connection with the corporation, since no breach of duty is traceable to such knowledge. * * * Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit, enterprises or investments which, though capable of profit to the corporation, have in no way become subjects of their trust or duty''
>
> *Lagarde v. Anniston Lime Co.,* 28 So. (Ala.) 199, 201-2.

And to draw an analogy from the law of partnership, it may be pointed out that the Supreme Court remarks that

> ''to hold that a partner can never derive any personal benefits from information which he obtains as a partner, would be manifestly absurd; and it was said by Lord Justice Bowen that the character of the information acquired from the partnership transaction, or their connection with the firm which the partner might not use for his private advantage, is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right''
>
> *Latta v. Kilbourne,* 150 U. S. 524, 550;

and if, as we have seen, the Presidio Mining Company had no vested right in Section 5, it had, and it could have had, no vested right in Mr. Noyes' knowledge of or concerning Section 5.

The amended bill, paragraph 14, page 57, states no basis whatever for any trust; if the circumstance that an adjacent piece of realty might be an advantageous asset to a corporation, were enough to impress a trust upon it, because it happened to have been purchased by a director of the corporation, no man of any initiative would consent to become a director; and if the purchase had been made by the director while the company was,

not only without any plans whatever relative to the property purchased, but also financially helpless to execute such plans if it had them, how can equity be then appealed to to create a trust without the grossest injustice to the director?

> "Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit, enterprises or investments which, though capable of profit to the corporation, have in no way become subjects of their trust or duty"
>
> *Lagarde v. Anniston Lime Company,* supra.

This amended bill, from line 10 of page 57, to line 26, of page 57, merely shows, giving it a latitudinarian interpretation, that proprietorship of Section 5 might have been important to the Presidio Mining Company; but that is no basis upon which to rest a trust, especially since the proof shows that the installation of the cyanide plant rendered Section 5 unnecessary to the continuance of the business of the Presidio Mining Company, and that Mr. Noyes' purchase of Section 5 in no way impaired the value of Section 8. As observed in the *Lagarde* case, supra,

> "proprietorship of the Martin property may have been important to the corporation, but it is not shown to be necessary to the continuance of its business, or that the Lagardes purchase in any way impaired the value of the corporation's property. In such cases, it is immaterial that knowledge of the situation was gained by the Lagardes through their connection with the corporation, since no breach of duty is traceable to such knowledge."

15. No resulting trust accrued to the Presidio Mining Company from the acquisition of Section 5 by Mr. Noyes.

This was the original and primary contention of the complainant; his position was that the money that

purchased Section 5 was furnished from the treasury of the company; later he learned that he was mistaken and that the money came, not from the company at all, but from William S. Noyes; and a very little intelligent, disinterested and impartial inquiry would have, at the beginning of things, assured him of the truth in this behalf; and this phase of the situation illustrates the many errors, both of fact and of law, into which his mania to "control the management" (letter Overton to Gleim, pp. 623-4 of Record), has precipitated him. But resulting trusts are raised in law from the presumed intention of the parties and the natural equity that he who furnishes the means for the acquisition of property should enjoy its benefits (*Jackson v. Jackson,* 91 U. S. 125; *Smithsonian Inst. v. Meech,* 169 id. 407).

> "It is true as a general proposition that he who pays the consideration means, in the absence of all rebutting circumstances, to purchase for his own benefit; and there may be a resulting trust for the use of the party paying the consideration. But this is founded upon a mere implication of law, and may be rebutted by evidence showing that such was not the intention of the parties"
>
> *Jenkins v. Pye,* 12 Peters, 252.

But

> "a resulting trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be created by after advances or funds subsequently furnished. It does not arise upon subsequent payments under a contract by another to purchase".
>
> *Olcott v. Bynum,* 17 Wall. 60.

It thus becomes clear that:

1. The intention that there should be a resulting trust for the use of the party paying the consideration,

is a mere presumption or implication of law, rebuttable by evidence;

2. That money that purchased Section 5 must have been furnished by the Presidio Mining Company;

3. Such money must have been furnished at the very time of the purchase, not subsequently;

4. Such money must have been intentionally furnished by the Presidio Mining Company for the specific purpose of that very purchase,—not *ex maleficio* taken from the company by Mr. Noyes a year or a year and a half later, and by him employed to pay off notes that had been given by him for the money actually used in the payment of the purchase price.

There is, indeed, not a particle of proof that the moneys that paid the notes executed by Mr. Noyes came from the impoverished coffers of a corporation steeped in impecuniosity to the very lips; the uncontradicted proof upon that subject traces that money, as we have seen, to a wholly different source; nor, even if argumentatively we assume, in the face of the evidence, that those moneys came from the company, is there a particle of proof either that the moneys were intentionally furnished by the company for the specific purposes of that purchase, or that any company moneys came wrongfully into the possession of Mr. Noyes,—all of the facts, prior to, contemporaneous with, and subsequent to this purchase establish the utter absence of any intention, of any expression of intention, of any act done to execute any intention, and of any ability, upon the part of the Presidio Mining Company, to

furnish the funds for the purchase of Section 5. Even if it were proved that Mr. Noyes took money from the company treasury a year or a year and a half after the purchase to compensate him for the moneys expended by him in the purchase of Section 5, that would obviously not impress any resulting trust upon Section 5 in favor of the company, even though we were to assume that it might create a cause of action by the company against Mr. Noyes for an unlawful diversion of company funds or assets.

16. Complainant's change of front from resulting to constructive trust does not enlarge his asserted equities.

We are unable to interpret the original and amended bills of complaint in any other way than as asserting a resulting trust, upon the theory that the Presidio Mining Company, at the time of the purchase of Section 5, furnished the money which was used by Mr. Noyes in the purchase of that section. We find the amended bill alleging, on page 61, that payments of company funds were made to Mr. Noyes,

> "to provide said William S. Noyes with the funds necessary to better enable him to purchase said Section 5; that the greater part of said funds so received by said William S. Noyes from the treasury of the Presidio Mining Company were used by him in the purchase of said property";

and if, adopting a phrase of Mr. Justice Holmes, this language:

> "is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech"
>
> *Swift v. U. S.*, 196 U. S. 375, 395,

we must confess our inability to interpret it as suggesting anything else than an allegation of a resulting trust. But, when we turn to the supplemental bill, we are constrained to interpret that pleading as abandoning the theory of a resulting trust, because we are wholly unable to reconcile with the accepted nature of a resulting trust, such allegations as these:

> "Said William S. Noyes borrowed the money to pay for the stock of the Silver Hill Mill and Mining Company (the owner of Section 5) then held by him under option. That he borrowed $10,000 from the Marfa National Bank and gave as security his stock in the Presidio Mining Company. That he borrowed $10,000 from one Benton Bowers, residing in Oregon, and gave his promissory note for $5000 to Harry B. Young in the premises." (227)

We respectfully urge that these allegations are wholly repugnant to any theory of a resulting trust, and cannot be reconciled with the position taken in the amended bill. In passing, we beg leave to observe that the statement that "he borrowed $10,000 from the Marfa National Bank and gave as collateral security his stock in the Presidio Mining Company", sins by omission; it would leave the impression upon the mind of a reader unfamiliar with the history of these transactions that the only security given the Marfa National Bank was Mr. Noyes' stock in the Presidio Mining Company; but the fact is that the influence which enabled Mr. Noyes to obtain this $10.000 from the Marfa National Bank, was that derived from the endorsement and assistance of Mr. William Cleveland, one of the directors of that bank. Mr. Cleveland tells us that

> "I went to see the bank and made arrangements for him to get the money. I am a director of the Marfa

> National Bank and have been ever since it was established in 1907. I made arrangements for Mr. Noyes to get the money from the bank; he borrowed the money, $10,000. I don't know what security he gave; I went on his note, I know that. * * * I went on the note with Mr. Noyes when he borrowed the money from the Marfa National Bank; the bank was not personally acquainted with Mr. Noyes, and wanted some security, so I went on the note with Mr. Noyes at the bank; the bank required an endorser; I do not recollect whether Mr. Noyes asked me to go on the note; I know I had to do something to get him the money; I told him I would get him the money. * * * In 1912, and the early part of 1913, I would not have loaned the Presidio Mining Company any money without additional security. I could not say whether stock of the Presidio Mining Company was put up as security on this note of William S. Noyes" (Record, volume 3, pages 899-902-3, 904).

We think, therefore, that the statement that Mr. Noyes obtained this money from the Marfa National Bank and gave as collateral security his stock in the Presidio Mining Company is a very partial and imperfect statement, and that the real instrumentality through which he got the money and the real security upon which the bank made the loan, was the name of Mr. Cleveland upon the note.

Although the theory of a resulting trust has thus been abandoned by these pleadings, the contention of the complainant was, and possibly still is, that a constructive trust existed in respect of Section 5; and we urge that this change of front is inequitable and destroys confidence in the sincerity of the complainant and his singleness of purpose, especially when appraised in the light of the Overton letter to Mr. Gleim, wherein we see the solitary active complainant in this litigation

looking forward to the time when he would "control the management". As observed by the Supreme Court:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."
>
> *Ohio, etc. Ry. v. McCarthy,* 96 U. S. 258, 268.

And in addition to this consideration, it should be pointed out that the abandonment of this theory of a resulting trust is an admission that the funds which purchased Section 5 were not originally or contemporaneously furnished by the company, a view which is fortified by the declaration of the complainant's solicitor to the effect that Mr. Noyes' notes "were not paid until a year or a year and a half after that particular period (the period of the purchase of Section 5) and the moneys were taken from the corporation" (Vol. 3, page 694). This situation, we submit, furnishes a complete corroboration of Mr. Noyes as to the original sources whence the funds with which the purchase was made primarily came.

17. No constructive trust accrued to the Presidio Mining Company from the acquisition of Section 5 by Mr. Noyes.

In the fall of 1912, did any duty or trust rest upon Mr. Noyes which required him to acquire Section 5 for this corporation? Did Mr. Noyes breach any duty or trust owing to this corporation by acquiring Section 5 for himself, or by failing to acquire it for the corpora-

tion? Did the corporation during 1912-13, possess any such right, title, estate or interest in Section 5 as would entitle it to treat that section upon its acquisition by Mr. Noyes with funds furnished by him alone, but not by it, as impressed with any trust in its favor? These questions must be answered in the affirmative, if these complainants are to prevail; these questions cannot be answered by declamatory asseveration, however vociferous, or by the calling of names, however harsh, or by obscure charges of fraud, however reiterated or harped upon; but they are, we submit, to be answered only by specific and concrete facts, so distinct, definite and palpable in this present record, that the investigator may readily put his finger on the relevant page. In these proceedings, the complainant is the actor; he is the accuser; he charges fraud; and as to every factor essential to the maintenance of his theory of fraud, and as to every fact or series of facts upon which he relies to establish his accusation, it is his plain duty to lay with explicit distinctness a clear foundation. Nothing short of this, we submit, will avail to sustain the decree or order here appealed from.

Whether Mr. Noyes was in duty bound to purchase for the corporation, or to refrain from purchasing for himself, depends, among other things, upon whether any fiduciary relation actually existed between the purchaser and the corporation, *quoad* the thing purchased (*Palmer v. Cypres Hill Cemetery,* 25 N. E. (N. Y.) 983); whether the corporation had an interest actual or in expectancy in the property (*Trice v. Comstock,* 61 L. R. A. 176; *Lagarde v. Anniston Lime Co.,* 28 So.

(Ala.) 199, 201-2); and whether the purchase of the property by the fiduciary (if there was one) hindered or defeated the corporation, in its plans (if it had any plans) for developing the business for which it was created (*Trice v. Comstock,* supra; *Lagarde v. Anniston Lime Co.,* supra); but Mr. Noyes was not called upon to go out, purchase Section 5, and then make a gift of it to the Presidio Mining Company. It cannot, we think, be disputed that to establish a constructive trust in Section 5, the complainant must both allege and prove the existence of some property right in Section 5, either actual or in expectancy, in the Presidio Mining Company; a relation fiduciary in character between Mr. Noyes and the Presidio Mining Company in regard to Section 5; that the company itself was incorporated for the specific purpose of acquiring Section 5; and that the company had some antecedent plan, policy, design or purpose in regard to Section 5 with which Mr. Noyes clandestinely interfered by acquiring the property for himself; and unless these conditions exist, no constructive trust, we submit, can be impressed upon the property. The legal title to Section 5 must have been obtained by Mr. Noyes in violation of a duty owed to the Presidio Mining Company as to that section, and he must hold the property in hostility to its beneficial rights of ownership; or, as concisely stated in *Steinback v. Bon Homme Mining Company,* 152 Fed. 333, 338,

> "the test of the existence of a constructive trust of this nature is the fiduciary relation, and the betrayal reposed under it to acquire the property or interest of the cor-

relate, and, in the absence of either of these indispensable elements, no such trust can arise."

Not only did Mr. Noyes not purchase Section 5 from this company, but from strangers, not only had this company no interest whatever in that section at the time of its purchase, not only did Mr. Noyes in that transaction employ none of the funds or credit of the company, but only his own funds and credit, but at that time he was in no such relation to the Presidio Mining Company as would have made it his duty either to purchase the section for the company or to refrain from purchasing it for himself; he was not at that time a director of the company, nor was he an officer; he was, to quote the language of the amended bill a mere "salaried employee"; and he took his orders from his board of directors. Before any constructive trust can be evolved from the relations between Mr. Noyes or these directors and this corporation, some proper inquiry should be addressed to those relations and to the limitations and scope thereof; and upon this topic, the vagueness of general declamation will be felt to be quite unsatisfactory. Not only can there be no doubt concerning the wide discretion of directors as to policies and methods (*Cowell v. McMillin,* 177 Fed. 25; *Post v. Buck Stove Co.,* 200 id. 918), but it is equally settled that directors may deal with their corporation, that no antecedent presumption of fraud vitiates such dealings, and that if the dealing be fair it will be upheld, and particularly so if beneficial to the corporation (*Twin Lake Oil Co. v. Marbury,* 91 U. S. 587; *Cowell v. McMillin,* supra; *Black v. Supreme Council,* 120 Fed.

582). Although contracts or agreements, whereby directors deal with themselves, become interested adversely to the corporation, and combine to obtain for themselves property belonging to the corporation, are voidable at the election of the corporation, yet this doctrine does not impair the right, for example, of a director to purchase corporate property (*Union Trust Co. v. Carter,* 139 Fed. 717; *Mobile Land & Improvement Co. v. Gass,* 39 So. (Ala.) 229). Thus, again, the fact that directors have a personal interest in and will profit by a contract with the corporation, will not condemn it; all that they are called upon to do is to justify the transaction (*Teller v. Tonopah Ry.,* 155 Fed. 482). A transaction is not fraudulent because an officer may secure a fair advantage by superior diligence in looking after his rights; that the same parties are directors of two contracting corporations, does not argue fraud (*Leavenworth County v. Chicago Ry.,* 134 U. S. 688); a corporation president may purchase a bond of the company from its receiver in good faith (*Manufacturing etc. Co. v. Bradley,* 105 U. S. 175); an official relation to a corporation does not prevent one from bidding at a corporate foreclosure sale, or from being interested in the purchase for another (*McKittrick v. Arkansas Ry.,* 152 U. S. 473). Stockholders or directors who make advances to a corporation are entitled to receive from the corporation the same fair treatment as other directors (*Hotel Co. v. Wade,* 97 U. S. 18; *Standard Co. v. Excelsior Co.,* 108 La. 74); contracts may validly be made between a corporation and its majority stockholder (*Wright v. Ky. Ry.,* 117 U. S. 72;

Central Trust Co. v. Bridges, 57 Fed. 767; *Rothchild v. Memphis Ry.,* 113 id. 476; *Price v. Holcomb,* 56 N. W. (Iowa) 411); and even irregular bookkeeping, whereby a transaction is put off the books is not fraudulent (*Figge v. Bergenthal,* 109 N. W. (Wis.) 581; 110 id. 798, holding *inter alia* that an officer may sell (and necessarily lease) property to the corporation, and cited as authoritative in *Cowell v. McMillin,* 177 Fed. 25). The net result of all the cases is, we think, this, that the ultimate test is fairness (*Twin Oil etc. Co. v. Marbury,* 91 U. S. 587; *Marr v. Marr,* 70 Atl. (N. J.) 375; *Iowa Drug Co. v. Souers,* 117 N. W. (Iowa) 300).

It should, we think, be borne in mind precisely what the situation was at the time when Mr. Noyes acquired Section 5. At that time, Mr. Noyes was not a director of this corporation, nor was he a majority stockholder thereof; on the contrary, he was merely what the amended bill describes as a "salaried employee". His stock holdings in the Presidio Mining Company did not then amount to more than 33,000 shares out of a total capitalization of 150,000 shares. No voting trust was then in existence. The Osborn shortage was discovered by him only in January, 1913, and upon his return to San Francisco from Texas he was confronted by the determination of Mrs. Willis, based upon grounds both of affection and business policy to shield the Osborn family from the disgrace of exposure and the company from the ruinous result of publication of the depletion of its treasury. The grade of ore in Section 8 was depreciated; the price of silver was low; the financial condition of the company was bad; it was

impecunious and in debt; it was carrying an overdraft; and the views of the non-resident stockholders were reflected in the Mills letters. It was under these disadvantageous conditions that Mr. Noyes renewed his recommendation of the installation of the cyanide plant, and it was due to the ability, energy, credit and good standing of this one man, battling alone against adverse conditions, that this cyanide plant was eventually installed; and into its installation there flowed whatever meagre funds were left in the treasury of this company after its depletion by Osborn. In all of this, the complainant and his predecessor held aloof; he gave no help; like Mrs. Willis, he resisted the levying of assessments; and it is nowhere in evidence that he ever contributed one dollar to protect this company from the ruin that seemed unavoidable. As stated in *Mackay v. Burns,* 64 Pac. (Colo.) 485, 488, during the period of time with which we are here concerned,

> "the corporation had no money in its treasury; no credit by which it could raise money; its stock no market value, and, in fact, no value at all except as a purely speculative one. That the acts complained of were highly beneficial to the company, and to each and everyone of its shareholders, and were, in fact, the salvation of the company, cannot be for an instant disputed or questioned. It therefore comes with an ill grace from one who has been so materially benefited by the transaction to complain, and courts of equity will not listen with much satisfaction to such complainants"

Gas Co. v. Berry, 113 U. S. 327.

And under all these circumstances, dividends being payable out of net earnings only (*Mobile Ry. v. Tennessee,* 153 U. S. 496; *Eyster v. Board,* 94 id. 504), it

would have been somewhat absurd to have looked for dividends, until such net earnings were available; and they would not have been justly available, until the obligations incidental to the rehabilitation of the company had been fully satisfied. Under all these conditions, then, how can it be said that in acquiring Section 5, any duty or obligation rested upon Mr. Noyes either to acquire that section for this company or to have abstained from acquiring it for himself. What duty, indeed, was this "salaried employee" under to this corporation, at the time in question, which would be inconsistent with the character of purchaser upon his own account of Section 5? We challenge the complainant in this case to point to any such duty, and we insist that this is another point where the case for this complainant breaks down. Merely to argue that Mr. Noyes was under certain duties to this corporation, is to argue nothing; what is needed to be made clear is that he was under a duty to this corporation as to this specific parcel of realty, Section 5. One who becomes an officer or director of a corporation may, if you please, let it be assumed, be under a duty to that corporation in regard to its general business affairs; but in order that he may be under any duty to that corporation relative to a specific piece of property, it is indispensible that there should be some connecting link between that property and the corporation—it is indispensible that the corporation should have some right, title, estate or interest in that property. In the cause at bar, however, keeping steadily in view the general situation and position of the Presidio Mining Company at the time when Mr. Noyes acquired Section 5, it is not only

obvious that the company had no right, title, interest or estate in that property, but was in such a position, financially and otherwise, that the acquisition by it of any right, title, interest or estate in that property was impossible. It has not been shown, and it could not have been shown, taking into consideration the history of the Presidio Mining Company, that the company, at the time of the acquisition of Section 5 by Mr. Noyes, had either any interest, actual or in expectancy, in that property, or any plan, purpose, desire or intention with regard to the same; this being so, its purchase was open to Mr. Noyes; and this being so all foundation for a claim of constructive trust disappears.

EVENTS SUBSEQUENT TO JANUARY 31, 1913, WHEN WILLIAM S. NOYES, FOR THE FIRST TIME, BECAME A DIRECTOR OF THE PRESIDIO MINING COMPANY.

1. The lease of January 25, 1913.

This lease was presented to the company, adopted, approved and entered into by it at the meeting of the board of directors of January 29, 1913; Mr. William S. Noyes was not present at this meeting; he was in Texas at the time, had been there since shortly after the middle of December, 1912, and remained there until February 5th or 10th, 1913 (689). His knowledge of the conditions surrounding the company at this critical period of time, satisfied him that this lease was a matter of real importance to the company if his plan for rehabilitation were to succeed; and his letter of January 23rd, written at the time of these transactions, and long

before he could have had any suspicion of any trouble from Overton or any other stockholder, fully illustrates his earnest desire to advance the welfare of the company. Under this lease, the only royalty which he would have received, and did receive, was fifty cents per ton, quite regardless of the extent of any benefit which might have accrued to the company over and beyond that fifty cents per ton; and to say that the action of Mr. Noyes in advocating this lease, or the action of the company under the existing circumstances in entering into the lease, was in any way even remotely suggestive of fraud upon the part of any person whatever, is, in our opinion, preposterous; and we are wholly unable to see what, considering all of the surrounding circumstances, was legally or morally wrong in the act of making this lease. If Mr. Noyes had not been a stockholder in the Presidio Mining Company, or if Mr. Lane had still retained control of the Silver Hill Company, and had made this lease under these circumstances and with these motives, what would be wrong about the transaction in law or in morals? But, since a stockholder, as we have seen, may deal with his corporation, and may do so at arm's length as a stranger might, why in the name of common sense, should that be wrong with the stockholder which was right with the stranger? Undoubtedly, as pointed out in *Cowell v. McMillin,* the standard rules controlling the action of directors are valuable rules, but they should not, we submit, be put upon a pedestal and worshipped as a fetish to the detriment of other rights equally valuable; we are unable to preceive why, in

order to do justice to one person, it is necessary to do injustice to another; and we point to the views of this court in *Cowell v. McMillin,* where it is said:

> "We would not, to the slightest extent, depart from the salutary rule that directors and other officers of a corporation, occupying a fiduciary relation towards a corporation, are not permitted to assume positions which will bring their private interests into conflict with their duties to act solely in the interests of their corporation; nor would we argue upon the wisdom as well as the morality of the doctrine that where a corporation has made a contract with one of its directors, or a contract wherein one of its directors is personally interested and the interested director has taken part in the making of the contract, the corporation may elect to avoid the agreement so made even though it is in fact free from fraud. But these principles are not those which control in the present case, for here the transaction, when viewed as a whole and in its several parts, between the director and his company, was entirely free from fraud, and the contract was unanimously authorized by a board of disinterested persons, the interested director not voting. Thus, the case is brought within the rule recognized by the Supreme Court of the United States, namely, that where the director has acted with that candor and fairness which equity imposes as the guide for dealing between him and the corporation, and the transaction is open and free from blame, the director is not forbidden from making a contract with the corporation, or from entering upon a transaction in which he is personally interested. And an individual stockholder cannot enjoin the execution of a contract *intra vires* unless fraud is shown. 'So long as the agents of a corporation act honestly within the powers conferred upon them by the charter, they cannot be controlled. The individual shareholders have no authority to dictate to the company's agents what policy they shall pursue or to impair that discretion which was conferred on them by the charter.' "
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> *Cowell v. McMillin,* 177 Fed. 25, 39.

And here, it may not inappropriately be asked what possible interest the members of this board of directors which entered into this lease have been shown to have had in the transaction? Under the lease, Mr. Noyes was to have fifty cents per ton royalty; under the lease, the entire balance of gain or profit from each ton of ore went to the corporation; what witness, what document, establishes any interest by any member of the board, either in the fifty cents per ton that went to Mr. Noyes, or in the balance that went to the corporation? Of course, it cannot be claimed that the natural cleavage of sentiment within any corporation is fraud; but in the transaction now under investigation, what proof is there even of a cleavage of sentiment in favor of Mr. Noyes? The lease was an excellent thing for the corporation; in its then condition, the corporation required all of the help that it could get; surely, there is no syllable of evidence establishing any improper or illicit relations between Mr. Noyes, upon the one side, and any member of the board of directors, upon the other, touching the adoption of this lease; where, then, is there a fair or legitimate basis for any argument that this directorate was an interested one? And it may be added that during the course of the hearing even this complainant did not have the hardihood to complain that in the adoption of this lease, Gardiner and Herger were anything except disinterested persons; and it was established during the course of the hearing that no other person in this corporation had any interest in, or received any benefit from, any of the relations between William S. Noyes and the corporation itself.

"As to the charge made in the complaint here as to the entire board of directors deriving, or being interested in the contract with the Presidio Mining Company regarding Section 5, I will state that absolutely none of the officers or directors have any interest in that contract."

* * * * * *

"Mr. HARDING. It is charged here in the complaint that you and the other directors are interested with William S. Noyes in Section 5 contract. I wish to ask you whether you have either directly or indirectly any interest in that contract with W. S. Noyes.

"A. None whatever. I have not derived any benefits or profits whatever from that contract—not a cent."

* * * * * *

"Mr. HARDING. I want to ask the other witnesses who have testified here the last question I asked of this witness. I would like to ask Mr. Peat whether he has any interest directly or indirectly in the contract on this Section 5 with Mr. W. S. Noyes.

"Mr. PEAT. None whatever.

"Mr. HARDING. I would like to ask Miss Doherty to answer that question.

"Miss DOHERTY. No, I have not." (Record v. 3, pp. 724, 918-9)

It is submitted that no reasonable person, looking at the situation and condition of this company at this time, and giving due consideration to the benefit derived by the company from this lease, and to the utter absence of a single scrap of tangible evidence to establish any interest upon the part of any of the directors in the transaction, can fail to regard as far-fetched, unreasonable and unsound the claim that, because of any incident connected with this lease, especially as interpreted in the light of the situation of the company and of the actors in the transaction, Mr. Noyes "controlled" the company. The expression "biddable board of directors" is one which is quite fashionable in

litigation of this character; it is regarded as a delicious morsel for a complainant's solicitor to roll under his tongue; as Balzac would say, "the shibboleth has gray mustaches"; but it is not by the mere use of this well-worn phrase or by its tiresome repetition, that any directorate, in the absence of tangible evidence of actual facts, can be fairly adjudged to be "biddable". Without doubt, it is a very simple, smooth and easy thing to vociferate that a board of directors is "biddable"; but experienced judges are not to be misled by this sort of thing; they are not impressed by this species of "sound and fury" argument; and they will, with critical and analytical eyes, look into the facts to ascertain how far the assertions of one who would "control the management" (letter, Overton to Gleim, 623-4) are supported and sustained by the actual facts. We, therefore, invite the most complete examination of this transaction, with the fullest confidence that such examination will disclose nothing to the detriment of the corporation or its directorate, or its stockholders.

And if this lease be not established to have been an improper thing for the board of directors to have made, what was there that, in law, morals or business, was wrong with the royalty therein provided to be paid? If Mr. Lane had still retained the controlling interest in the Silver Hill Company, and had made this identical lease with the Presidio Mining Company, would it not be said that such a lease was a most advantageous one to the company? As we have seen, if a stockholder is entitled to contract at all with his corporation, he is entitled to make a fair and reasonable profit in his

transactions; but here, the profit was all on the side of the corporation; and all that Mr. Noyes received out of the lease was the fifty cents per ton royalty. The conspicuous benefit to the corporation, and the crass unfairness to Mr. Noyes, of this lease—a condition which entirely justified him as a sane business man in exercising his right under the lease to terminate it in order that he might obtain a fairer arrangement—may be illustrated by the Klink Bean & Company report. That report, in answer to defendants' suggestion No. 17, and in schedule 4, column 3, shows that for the calendar year 1913, 6848.2 tons were taken from Section 5; column 11 shows that 222,263.12 ozs. of silver were extracted; and column 14 shows its value to have been $127,197.62 or $18.574 per ton. The same schedule shows the operating costs to have been (column 15) $192,781.86 for 21,570.2 tons (column 1), or $8.94 per ton. Hence, the yield being $18.57 per ton and the cost being $8.94, the profit was $9.63 per ton, for which Mr. Noyes was to get fifty cents under the lease. In other words, under the fifty cent lease, the 6848.2 tons would produce for Mr. Noyes $3424.10; but under the equal division of net (placed to credit of William S. Noyes per Klink Bean & Company report, schedule 4, colmun 16) $39,-418.91. But if the fifty cent lease were continued, without any equal division of the net, all that Mr. Noyes would receive would be $3424.10, while the company would receive the entire net of $78,837.28 less the $3424.10 for Noyes, or $75,413.18.

It has been said, however, and without doubt the remark will be repeated here, that certain irregularities

occurred at this meeting; but an examination of the facts will develop that, assuming such irregularities to have occurred, they related to other transactions at the meeting, and had nothing whatever to do with this lease or its adoption; and the very persons who are understood to claim that these irregularities occurred, are the very persons themselves who established the entrance into this lease. Whether these irregularities occurred at all or not, is by no means established. The only evidence bearing upon the question is that of Gardiner, Herger and Peat. The testimony of Gardiner and Herger is of the flimsiest, weakest and most unconvincing character possible; no experienced appraiser of human testimony can read their testimony without preceiving that they really had no reliable recollection whatever in the latter part of 1916, concerning occurrences in which they were mere formal and uninterested participants in January, 1913. It is true that they concur in stating that the lease was submitted to the meeting, voted upon and adopted; but as to the other incidents, they exhibit all of the infirmities of the human memory. Neither of these men had any stake in the corporation; neither of them had any personal interest in its affairs; one of them was the clerk of the other; both acted as nominal directors at the request of Boyd; neither of them is shown to have expended one dollar either for the stock that stood in his name, or in any other direction for the benefit of the corporation; the only funds that either of them ever handled in connection with the affairs of the company were the funds that they received for acting as directors; when they were wanted Boyd called them by whacking on the floor of his office with the end of his

cane; after they had gone through the formal motions of the meeting, they were dismissed with their directors' fees; and from beginning to end they were without a single shred or particle of real interest in the corporation and/or its affairs; and nothing could be more unreliable than their attempts to remember circumstances long since obliterated from their memories—circumstances which even Overton's threats could not bring back with any clearness or reliability. In a word, neither their situation, nor their relation with the corporation, was such that they would be likely to remember with distinctness and accuracy what had actually occurred at a brief meeting held nearly four years prior to the time when they testified.

But Peat was connected with the corporation; at the time in question, he was an officer of the corporation; he had a business and personal motive to carry in his head the transactions at these meetings; and he did what neither Gardiner nor Herger did or could have done—that is to say, he checked his independent personal recollection by visiting banks and verifying dates from records. Peat was quite clear, distinct and positive, where Gardiner and Herger were clouded, vague and hesitating; and as we contrast these two stories, it becomes clear that no irregularities actually did occur; and the conclusion is forced upon us from a fair survey of the evidence that the positive testimony of Peat is to be preferred to the negative testimony of Gardiner and Herger (*Paauhau Sugar Plantation Co. v. Palapala,* 127 Fed. 920, 925); and that the proper and only permissible finding should be against the occurrence of any irregularities whatever.

If, however, we assume, for the sake of the argument only, that any of these irregularities actually did occur, the question at once returns as to the character, extent and persuasiveness of the proof, if any, presented by the complainant, to explain how these irregularities originated. Where is the evidence, oral or documentary, connecting William S. Noyes with these irregularities or any of them? What proof is there of any participation by Mr. Noyes in these irregularities? Is there any evidence here to establish, for example, that these irregularities were the result of that conspiracy, references to which take up so much space in the complainant's pleadings? We submit that this record may be searched from end to end without finding a single syllable of evidence to establish any relation whatever between William S. Noyes and these irregularities; we submit that there is no evidence here of any instigation by Mr. Noyes of any of these irregularities; there is no testimony exhibiting him as a party to or present at any of those acts or transactions; the testimony nowhere establishes any relation whatever between him and any of the acts or actors referred to; and in so far as it is attempted by this inadmissible hearsay to show these alleged irregularities, we further insist that, assuming the existence of these irregularities for argumentative purposes only, they are not shown to be themselves in any way related to the lease in question, or to be in the remotest degree suggestive of any improper or unfair dealings in that respect. On the general proposition that the term "hearsay" includes acts as well as speech, and that acts, conduct, speech and transactions occur-

ring without the presence of the person against whom it is sought to resurrect and use them, are not evidence, attention may be directed to the cases of *People v. Warren,* 134 Cal. 202, and *Englebretsen v. Industrial Accident Commission,* 170 Cal. 793, and *Employers Assurance Corporation v. Industrial Accident Commission,* id. 800. In the former of these cases, the Supreme Court recognized the capacity of hearsay evidence to injure a defendant, declined to weigh the effect which the admission of such testimony might have upon the action of a jury, and reasserted the right of a defendant to a fair trial upon competent evidence only, giving expression to the commendable thought that if the defendant could not be convicted upon a fair trial and legal evidence he should not be convicted at all; and in the latter of these cases the court held that findings cannot be based upon hearsay, and advises us that the rule against hearsay is something more than a mere artificial technicality of the law, and that it is a rule of good sense and fair dealing, founded upon the experience, common knowledge and conduct of mankind. And these views received the following support from the Circuit Court of Appeals for the Eighth Circuit:

> "The settled rules of evidence which govern the trial of actions measure the extent and secure the protection of the rights of persons and property. Reversals, modifications, or variations of these rules produce instability and uncertainty in these rights, and breed distrust of courts and of governments. No rule is more salutary, no principle is more vital to the security of the life, liberty, and property of the citizen, than that rule which prohibits the repetition of the narratives of strangers, whether verbal or written, to determine issues between litigants, and prescribes that only after due notice, and

> opportunity for cross-examination of the very parties whose statements are offered, and then only under the solemnity of an oath or affirmation, shall their stories be evidence. Strike down this rule, and the most sacred rights of person and property rest only upon the whimsical and pernicious gossip of the reckless, the irresponsible, and the vicious. The rule that hearsay is incompetent evidence is essential to the preservation of personal liberty and the rights of property. It should be guarded against encroachment with jealous care. Its enforcement is not discretionary with the courts, and its violation is fatal error.
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> *Board of Commissioners v. Keene, Five-cents Savings Bank,* 108 Fed. 505, 510.

It is further to be observed, in this connection that the Code of Civil Procedure of the State of California, in that portion which deals with the law of evidence, recognizes, in Section 1848, the well established principle that the rights of one party cannot be prejudiced by the declaration, act or omission of another, except by virtue of a particular relation between them—a section of the code which has received judicial consideration in *Deane v. Ross*, 105 Cal. 227, and *Bashore v. Parker,* 146 id. 525; and the application of this principle to the present predicament establishes that the absence of any relation between W. S. Noyes and the acts or actors mentioned by Herger and Gardiner, is wholly fatal to the claim that, assuming that any irregularities actually did occur, they are or could be properly chargeable, directly or indirectly, against Mr. Noyes. Nowhere throughout the evidence in this cause is there any showing of any particular relation between Mr. Noyes and the circumstances under which either Gardiner or Herger resigned as director, or between Mr. Noyes and

any conduct, demeanor or acts of either Herger or Gardiner, or any other person, at the meeting of January 29, 1913, or the minutes of the corporation which recite the transactions of that meeting; and there being no bond or connection, no relation, between the defendant and these transactions, it is plain that the testimony purporting to relate to these transactions is open to all of the objections adverted to by the courts in repudiating this class of evidence. That this evidence, although hearsay in its nature as against a man who at the time of the transactions in question was not in the State of California at all, and although relating to occurrences disconnected entirely from him, was produced for the purpose of binding him, goes without saying; for if that were not the purpose with which it was produced, there would be no reason to justify or excuse its presence. The apparent purpose of the introduction of this alleged evidence was to show discrepancies claimed to exist between the things actually done and actually said at this meeting, and the history of the meeting as related in the minutes of the corporation; and it was sought to charge Mr. Noyes with the consequences, and with the inferences to be drawn, from these alleged discrepancies, and to use this line of evidence to his disadvantage. The plain effort was to charge him with responsibility for the acts and speech, conduct, demeanor and transactions of strangers had and done at a meeting at which Mr. Noyes was not present, in which he did not participate, and between which and himself no relationship, no bond or connection of any character, had been established—the attempt was to bind Mr. Noyes by things done behind his back, and with which he was

totally unrelated. But not only is this line of evidence infected by the vice referred to, but these alleged discrepancies themselves had nothing whatever to do with the lease dated January 25, 1913; no alleged discrepancy between what was actually done at the meeting and what was actually recorded in the minutes of that meeting, in any way affects that lease; and there is no bond or connection, no particular relation whatever, established here between any one of those asserted discrepancies and the lease itself. We respectfully insist, therefore, that, even if we assume the irregularities claimed, still, there is no evidence in this record connecting Mr. Noyes in any manner whatever with those irregularities—nothing whatever to show that he instigated any of the acts done; and in the next place, we respectfully insist that the attempt to establish asserted discrepancies between what occurred at the meeting and what was recorded in the minutes, deeply prejudiced Mr. Noyes without throwing light upon the real issue as to whether the lease of January 25, 1913, was in any way wrong, improper or unfair. Confessedly, these alleged irregularities had nothing whatever to do with the transfer of the Osborn stock, or the acquisition by Mr. Noyes of Section 5; they throw no light upon the fairness or unfairness of the lease of January 25, 1913; they might all very well have occurred without in the slightest degree impugning any one of these transactions; no relation of any sort is proved between them and Mr. Noyes; throughout the entire occurrence Mr. Noyes was out of the State and far away in Texas; and from no point of view can they be treated as of the slightest importance or materiality.

Upon the whole, therefore, we respectfully insist that this lease of January 25, 1913, like most of the events subsequent to Mr. Noyes' acquisition of Section 5, is bound up with the regularity of that acquisition; this transaction, like all of the transactions which grew out of Mr. Noyes' acquisition of Section 5, must, we think, stand or fall with the regularity of that acquisition; if he did not properly acquire that section, then these subsequent transactions are without a sufficient basis to support them; but if he did acquire Section 5 properly, then, we submit, all of these various transactions are valid, and are not to be condemned *en bloc.* Thus, if Mr. Noyes properly acquired Section 5, as we claim he did, there is plainly no impropriety of any sort in this lease of January 25, 1913; if Mr. Noyes owned Section 5, he had a right not only to deal with the corporation concerning it, but to make a reasonable profit in the course of that dealing; but here, the lease was unusually favorable to the company, and grossly unfair to Mr. Noyes; and no discount can be discovered in any asserted irregularity claimed to have occurred in connection with the meeting of January 29, 1913.

2. The resolution of February 15, 1913.

The discovery of the Osborn shortage was the proximate cause of the reorganization of the directorate of the company. We have seen how that discovery affected Mr. Noyes, and how, in his letter of January 23, 1913, to Mrs. Willis, he urged such a reconstruction of the board as would prevent any recurrence in the future of peculations from the company's treasury. Not only was she anxious to avoid giving publicity to Osborn's pecula-

tions, not only upon the ground of sympathy and affection for his family, and also to avert the evil business consequences which would unavoidably follow the exposure of this defalcation, but she could not well have been unresponsive to the suggestion that such a reorganization of the board should be had as would prevent a repetition in the future of the act which she was then so anxious to retire from publicity. This was, of course, a plain common-sense view to take of the matter, indeed the only view which any rational person could take of the then situation; and nothing could well be more far fetched than to claim that because an intelligent woman concurs in an intelligent suggestion, naturally arising out of an unusual situation, the suggestion being intended for the betterment of the corporate interests and of her personal interest, she was therefore, to employ a term grown stale by repetition upon the lips of the complainant, "dominated" by William S. Noyes. It would seem, indeed, as if nothing which any of these parties did or could have done, however natural, however innocent, however spontaneous or appropriate, can escape this accusation of "domination", the thought of which seems to have completely poisoned the mind of the complainant; and it would seem as if the only possible reply to this rather tiresome accusation of domination would have been for William S. Noyes to have purchased Section 5 out of his private and personal funds, make a voluntary and unqualified donation of it to this corporation, assist the complaining farmer to "control the management" (letter Overton to Gleim, 623-4) of this mine, and promptly efface himself, his trained mind, his skilled engineering aptitude, his forty years'

experience as a mining engineer, and his thirty years' experience with the Presidio Mining Company.

The discovery of the Osborn shortage produced, then, this result, that it bought about the reorganization of the board of directors; and that at the meeting of January 29, 1913, Mr. Fish, who was an elderly and infirm man, was replaced by Mr. B. S. Noyes as a director, and Mr. Noyes in turn replaced Mr. Peat as president of the company. Subsequently, at the meeting of January 31, 1913, the dummy directors, Gardiner and Herger—men without slightest active or other real interest in the company or its affairs, resigned to make room for L. M. Doherty and William S. Noyes. Hence, on February 15, 1913, the newly constituted board was made up of L. M. Doherty, William S. Noyes, L. Osborn, B. S. Noyes, and John W. F. Peat; and the total stock holdings of this newly constituted board was 97,925 shares. Upon the adoption of the resolution in question, Mr. William S. Noyes declined to vote; and the directors who voted for this resolution held in their names and represented 65,482 shares. No other presumption can be indulged except that these directors acted in good faith and for the best interests of the company; they had no interest whatever with William S. Noyes in Section 5, either directly or indirectly; and it was affirmatively established upon the hearing that they had no interest whatever in any contracts between Mr. Noyes and the Presidio Mining Company. It cannot be said that these directors voted for this resolution in ignorance of the relationship between Mr. William S. Noyes, and the Silver Hill Company, or Section 5; on the con-

trary, as complainant tells us, all of these directors then knew that Mr. Noyes owned practically all of the stock of the Silver Hill Company; and the resolution itself refers in terms to the lease between the Silver Hill Mill and Mining Company and the Presidio Mining Company. In other words, the resolution of February 15, 1913, amounts to a conscious acquiesence by the Presidio Mining Company in the purchase of Section 5 by Mr. Noyes.

The resolution was adopted on an occasion when the entire board of directors was present. It was proposed by L. M. Doherty, and seconded by John W. F. Peat; and it was unanimously adopted by such a vote as to render wholly unnecessary any vote by Mr. William S. Noyes; but it affirmatively appears from the record that upon the matter of the adoption of this resolution, Mr. William S. Noyes declined to vote at all; and this condition of fact, interpreted in the light of *Schnitger v. Old Home Mining Company,* 144 Cal. 603, 606-7, places this resolution beyond the reach of impeachment upon any principle known to the corporation law of the domicile of the Presidio Mining Company. In that case, money was loaned to the corporation by two of the directors, and they took the note and mortgage securing the loan in the name of a third person, *and failed to disclose their interest;* and they were present at the meeting of the directors at which the loan and security were voted on, and participated therein; but the Supreme Court taking a rational view of the situation, held that it was not a fraud on the corporation, or upon the other members of the board for the two directors interested

not to disclose the facts, and that it was no violation of their duty to loan the money in the name of another instead of in their own name, unless it could be shown that the corporation sustained some detriment, or that the directors lending the money obtained some undue advantage over the corporation. The argument was made at the bar, that as Hahn and McKewen were directors of the corporation defendant, their relation to the corporation and to its stockholders was that of trustees, and by virtue of that relation, "the transaction in which the loan was made to the corporation was void"; but in answering this contention, the Supreme Court remarked:

> "A director of a corporation, like any other trustee, is bound to act in the utmost good faith toward his beneficiary (Civ. Code, sec. 2228) and is forbidden to take part in any transaction concerning the trust in which he has an interest adverse to that of his beneficiary (Civ. Code, sec. 2230); but he is not absolutely precluded from dealing directly with the corporation of which he is a director. Any transaction between them is subject to rigid scrutiny, and is voidable at the instance of the beneficiary for any violation of his duty as trustee, but is not *ipso facto* void. 'The mere fact that the creditor was a director of the company does not render the transaction fraudulent. There is nothing which forbids either members or directors of a corporation from making contracts with it like any other individual; and when the contract is made, the director stands as to the contract in the relation of a stranger to the corporation' (Stratton v. Allen, 16 N. J. Eq. 229). Mr. Thompson says (3 Thompson on Corporations, sec. 2068): 'We therefore find the prevailing doctrine to be, that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor, but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith.' (See, also, Taylor on Corporations, sec. 634; Twin Lick

Oil Co. v. Marbury, 91 U. S. 587; Beach v. Miller, 130 Ill. 162; Santa Cruz R. R. Co. v. Spreckels, 65 Cal. 193; Sutter Street R. R. Co. v. Baum, 66 Cal. 44; Pauly v. Pauly, 107 Cal. 8; Philips v. Sanger Lumber Co., 130 Cal. 431.)

The question presented upon this appeal does not involve the validity of a transaction in which the director of a corporation has executed a contract on behalf of the corporation in which he is personally interested, without any previous authority of the corporation, or where the resolution authorizing its execution depended upon his vote therefor. The transaction was had under the authority of the corporation, given at a meeting of the board of directors at which all were present, and although the court finds that at that meeting Hahn and McKewen 'were present and participated therein', it does not find that they voted upon the proposition for the loan. But, even if they had voted for it, the transaction would not have been thereby vitiated, inasmuch as the votes of the other three members of the board were sufficient to make the resolution effective. (Porter v. Lassen County etc. Co., 127 Cal. 261). It was not a fraud upon the corporation, or upon the other members of the board, for these directors not to disclose the fact that they were the real parties who were loaning the money, or that the person in whose name the transaction was had was merely a figurehead. It was no violation of their duty as trustees to loan the money in the name of another rather than in their own, unless it could be shown that thereby the corporation sustained some detriment, or they obtained some undue advantage over the corporation."

Schnitger v. Old Home Mining Company, 144 Cal. 603-7.

And see the case last cited approved and followed in:

Snediker v. Ayers, 146 Cal. 407;

California Land Co. v. Cuddeback, 27 Cal. App. 450;

Aetna Indemnity Co. v. Altadena Mining Co., 11 Cal. App. 177;

Shively v. Eureka Mining Co., 5 id. 245;
Nixon v. Goodwin, 3 id. 364;
Tatem v. Eglanol Mining Co., 113 Pac. (Mont.) 299;
Minn. L. & T. Co. v. Peteler Car Co., 156 N. W. (Minn.) 257;
C. & A. Land Co. v. Cuddeback, 150 Pac. 381, 382.

The purpose of this resolution was two-fold: in the first place, to authorize the officers of the corporation to recognize the services of Mr. Noyes by paying him $11,000 on account of ore already broken in Section 5, and then in possession of the company; and in the next place, since there was the reasonable expectation that he would further serve the corporation through Section 5, to arrive at an approximation of what the net value of the ore from Section 5 would be, until such time as a final contract could be made between the company and Mr. Noyes, upon the acquisition by him of the legal title to Section 5 by deed from the Silver Hill Mill and Mining Company and the dissolution of the latter company; and the resolution is quite plain and clear, we think, in its recitals and its terms. It recites that Mr. Noyes expended large sums of money, that he rendered valuable services in securing the fifty cent lease of Section 5, and that, in the future, he would continue to render those valuable services. The measure of compensation as that compensation was recited in this resolution, was obviously not intended, and could not have been intended to be absolute, but only approximate; under the resolution, Mr. Noyes was to receive the $11,000 forthwith; and the balance was to be paid to him in deferred

payments at different times, and, what is particularly significant, "said deferred payments shall be made to said Noyes as fast as the earnings of this company will permit". In other words, those payments were to be made, not out of the general assets of the company, but out of the earnings of the company, and then only so fast as the earnings of the company would permit. And it will have been observed from the record that not a syllable of testimony was produced to exhibit any secrecy or concealment by Mr. Noyes in any of his conduct under or relating to this resolution; on the contrary, his conduct in and about this resolution, and the moneys received by him under it, was characterized by the most complete and unqualified openness and publicity. He gave a written voucher for the money received by him under the resolution, which voucher was placed among, and produced from, the ordinary files of the company, where it was open to the inspection of any stockholder or other duly authorized person; and the record further shows that an entry of the payments made to him pursuant to this resolution, was duly made in the cash book of the Presidio Mining Company. There was neither reason nor necessity for a publication in the daily press of the receipt by Mr. Noyes of any funds under this resolution; and when publicity was given to the fact by the deposit of the voucher and the entry in the cash book, that publicity, which advertised his action to every stockholder, was surely all that could have been expected from him. And if ever a person dealing with a corporation was entitled to rely upon the conduct of the corporation itself, Mr. Noyes was entitled to rely upon the authority of that resolu-

tion; and as emphasizing this aspect or feature of the matter, it must be pointed out that at the stockholders' meeting on October 6, 1913, this resolution of February 15, 1913, was fully ratified, approved and confirmed by the stockholders; and in addition to this, it actually appears from the voucher of December 29, 1913, introduced upon the hearing below, that Mr. Noyes gave full credit to the Presidio Mining Company for every dollar of this sum of $11,000.

It is submitted that no construction of this resolution would be fair which did not consider all parts of it. We think that it should be taken as it is written, without addition thereto or subtraction therefrom; that it is to be tested, as to its meaning, by its own terms; that neither its terms, purpose or meaning can be expanded or limited by construction; and that every word should be given effect. As observed by Mr. Justice Strong, speaking of the construction of a statute—and the rule is equally applicable to the construction of a resolution, or other written instrument,

> "we are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, Sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant'. This rule has been repeated innumerable times."
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> *Washington Market Co. v. Hoffman,* 101 U. S. 115.

And if it be true as stated in Section 1858 of the Code of Civil Procedure of the State of California, that

> "in the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as to give effect to all",

then surely the provision in this resolution, which conditions the deferred payments to Mr. Noyes upon the earnings of the corporation, is no more to be laid out of view in the construction of the resolution, than any other portion thereof. This resolution contains that proviso, but if no effect is to be given to that proviso, "We can conceive of no reason for its insertion" (*Thaddeus Davids Co. v. Davids,* 233 U. S. 461, 467); and it is quite as true, we submit, of instruments as of statutes that in cases of repugnancy, the proviso, as the last expression of legislative or contractual will must prevail (*Merchants National Bank v. U. S.* 214 Fed. 200). In other words, we submit the fair construction of this resolution to be, in so far as it directs the payment of moneys, that those moneys are separated into two classes; those moneys which are payable "forthwith"; and those moneys the payments of which are "deferred"; and we submit that the fair construction of this resolution, taken as a whole, makes the "deferred payments" contingent upon the earnings of the company. Those deferred payments, we submit, were payable from no other source; they were to be made only so fast as the earnings permitted; and obviously, if there were no earnings, there could have been no payments, because the sole channel through which those payments could flow would be blocked.

With reference to the general subject-matter involved in this resolution, it may be remarked, in general, that stockholders, whenever in their opinion the case is a proper one, may vote compensation to directors in consideration of past services (*Normandie v. Ind, Coope & Co.,* 1 Ch. (1908) 84; *Figge v. Bergenthal,* 109 N. W. (Wis.) 581; 110 id. 798; cited as authoritative in *Cowell v. McMillin,* 177 Fed. 25; *Schickell v. Berryville Land Co.,* 37 S. E. (Vir.) 813; ratification.) But

> "in no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on, and an influence in controlling its conduct; but they have created a legal entity to prosecute such business, make its contracts, and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business".
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> *People v. American Bell Telephone Co.,* 117 N. Y. 255;

and consequently stockholders cannot enter into corporate contracts with third persons, and such contracts can only be properly made by the board of directors. It is without doubt within the power of a corporation to contract to pay an employee a percentage of the profits (*Bennett v. Millville Improvement Co.,* 67 N. J. L. 320; *McIntyre v. Ajax Mining Co.,* 77 Pac. 615); and for services outside the scope of duty of an officer or director—the scope of that duty being defined by the by-laws and minutes—it is not improper to award compensation (*Montana Mining Co. v. Dunlap,* 192 Fed. 714; 196 id. 612). It may, we think, fairly be said to be the law that directors are entitled to indemnity or reimbursement for losses which they may suffer or expenses

to which they may be put on behalf of the corporation, and to interest on sums expended.

Gleadow v. Hull Glass Co., 19 L. J. Ch. 44:
transaction, if reasonable, unaffected by shareholders' subsequent disapproval;

Re National Financial Co., 3 Ch. 791:
purchase by director in own name for own company;

Re Pooley Hall Colliery, 18 W. R. 201:
lease by director in own name for own company;

Rider v. Union India Rubber Co., 5 Bosw. 85:
director permitting consumption or use of his property entitled to fair value;

Greensboro Co. v. Stratton, 22 N. E. (Ind.) 247:
director permitted compensation for use of his property entitled to fair value;

Deane v. Hodge, 59 A. R. 321:
entitled to royalty for company's use of his patent with his consent.

Wright v. Knoxville Co., 59 S. W. (Tenn.) 677:
entitled to reasonable rental for company's use of his property.

Savage v. Madelia Co., 108 N. W. (Minn.) 296:
entitled to indemnity when compelled to take up company notes which he endorsed.

Ex parte Sedgwick, 2 Jur. N. S. 941;

In re International L. A. Society, 39 L. J. Ch. 271;

In re Gibbs & West, 10 Eq. 312;

Lowndes v. Garnet Gold Mining Company, 33 L. J. Ch. 418;

Coe v. N. J. Ry., 31 N. J. Eq. 105, 133-8;
Bakers Case, 1 Dr. & Sm. 55, 65, 66;
Ulster Ry. v. Bainbridge Ir., Rep. 2 Eq. 190, 203;
entitled to reimbursement where claims against the company are paid off "for the honor of the company" and director subrogated to the rights of creditors whose claims he discharged.
Kroeger v. Calivada Co., 119 Fed. 651;
interest allowed on expenditures.

This right to compensation rests upon the principle of indemnification and reimbursement. The rule is that directors who have rendered to their company services which were outside the scope of their official duties may recover from the company the reasonable worth of such services; and in so holding, the law is not permitting them to make a profit out of their position, but is merely protecting them from loss by allowing them adequate compensation.

Corrine Mill v. Toponce, 152 U. S. 408;
Bassett v. Fairchild, 132 Cal. 637;
Fitzgerald v. Fitzgerald, 137 U. S. 98;
Rockford Ry. v. Sage, 16 A. R. 587;
Ten Eyck v. Pontiac Ry., 16 A. S. R. 633;
New Orleans Packet Co. v. Brown, 51 A. R. 5;
Taussig v. St. L. Ry., 85 S. W. (Mo.) 378:
services as attorney at law;
Lowe v. Ring, 92 N. W. (Wis.) 238;
services as attorney at law;

Waters v. American Finance Co., 62 Atl. (Md.) 357:
services as selling agent or broker;
Bogart v. N. Y. Ry., 102 N. Y. S. 1093;
services as engineer.

In connection with the application of this principle to cases where directors are concerned, the question arises as to how far may an interested director lawfully deal with the company. And here, we submit, the underlying principles are two; in the first place, assuming the director to be a fiduciary, no fiduciary is permitted to contract with himself, or to represent his principal or *cestui que trust* in any transaction, in which he himself has a private conflicting interest; if the fiduciary undertook to do so, the contract or transaction is voidable at the option of the principal or *cestui que trust;* but if the principal or *cestui que trust* were *sui juris* and apprised of all material circumstances, he may consent to remove this disability of the fiduciary. In the second place, all contracts or dealings between a trustee and his *cestui que trust,* are *prima facie* voidable; but if it appear that the trustee acted in good faith, and made disclosure of the material circumstances to the *cestui que trust,* the transaction can stand. And in a given case, the question usually presents itself as to which of these principles is applicable. When is a given contract between a director and his company, entered into by the fiduciary with himself, or with his *cestui que trust*?

Under what circumstances can it be said that the director has divested himself of his fiduciary capacity, and, representing himself alone, is dealing with his

cestui que trust, the corporation? It is thought that classification will simplify this matter, and five classes of cases may be considered:

1. Contracts authorized on behalf of the company by the interested director's own vote:

Here, the contract is made by the board of which he is a member, and his vote is necessary to the passage of the resolution authorizing the contract; such a contract would be voidable at the option of the company under the first of the principles above mentioned, even though, it would seem at least according to the earlier cases, the interested director made the fullest disclosure and even though the contract were fair and beneficial to the company. But a decision that such contracts are absolutely void, is against the weight of authority.

Wilbur v. Lynde, 49 Cal. 290;
Shattuck v. Oakland Co., 58 id. 551;
Sims v. Petaluma Gas Co., 131 id. 656;
Sacramento Bank v. Copsey, 133 id. 663;
Goodell v. Verdugo Co., 138 id. 308;
Pacific Vinegar Co. v. Smith, 145 id. 352;
Reynolds v. Diamond Mills Paper Co., 60 Atl. (N. J.) 941;
Greathouse v. Martin, 94 S. W. (Tex.) 322;
Camden Land Co. v. Lewis, 63 Atl. (Me.) 523.

2. Contracts for which the interested director votes, but which have a sufficient majority without his vote:

Here the interested director participates in the action of the board, but his vote is not a determining factor. Since the interested director's vote was not necessary

to the passage of the resolution, the contract should be regarded as made between the director on the one side and the corporation represented by the other directors on the other; and consequently the contract, being governed by the second of the principles above mentioned, should be enforceable against the company, if it appeared that the interested director acted in good faith, and that the contract is fair.

But in California, the rule is that the contract is enforceable, although the interested director participated, if there was enough disinterested votes to pass the resolution without counting his vote.

Schnittger v. Old Home Mining Co., 144 Cal. 603, 607;

Porter v. Lassen County L. & C. Co., 127 id. 261;

Fudicker v. East Riverside Dist., 109 id. 29;

Graves v. Mono Lake Company, 81 id. 303, 320;

3. Contracts in which the interested director takes no part on behalf of the company.

Where the company is represented by the other directors, the interested director, having acted solely on his own behalf, has not occupied a dual relationship; and, therefore, the contract should be governed by the second of the principles above mentioned; the contract would not be voidable merely because of the interested director's official relation to the company (*Schnittger v. Old Home Mining Co.,* 144 Cal. 603; where the fact of the director's interest in the contract is not disclosed; *Beach v. Stouffer,* 84 Mo. App. 395; *Rose Hill Cemetery Co. v. Dempster,* 79 N. E. (Ill.) 276.)

4. Contracts which are either previously authorized or subsequently ratified by the shareholders:

The former class of contracts is rare, but ratification is common. And a contract subsequently ratified or confirmed by the shareholders is binding.

Farmers Co. v. San Diego Co., 45 Fed. 518, 527; sweeping clause ratified "all the acts of the officers";

San Diego Ry. v. Pacific Beach Co., 112 Cal. 53;

Reilly v. Loma Vista Co., 82 Pac. (Cal.) 686;

Pacific Vinegar Works v. Smith, 145 Cal. 352; ratification by acquiescence;

Foster v. Mansfield Co., 146 U. S. 88: right to rescind for actual fraud lost by laches;

Schnittger v. Old Home Mining Co., 144 Cal. 603; director's interest undisclosed;

Wickersham v. Crittendon, 110 id. 332, 334;

Kellerman v. Maier, 116 id. 416, 422-3.

It should be noted that failure to submit the contract to the shareholders for ratification does not render it void; it remains merely voidable by the company *(Urner v. Sollenberger,* 43 Atl. (Md.) 810)—that is to say, it is still valid until disaffirmed by the corporation; and it is the company's right of disaffirmance that is tolled by ratification of the shareholders.

It should further be noted that the agreement embodied in this resolution of February 15, 1913, was ratified at the stockholders' meeting of October 6, 1913; and in this connection, it should be pointed out that even where an interested director is expressly prohibited from voting as a director, still he may never-

theless vote as a shareholder, the result of the confirmation or ratification being none the less effective because carried by his vote or votes.

Hodge v. U. S. Steel Corp., 60 L. R. A. 742;
Gamble v. Queen's County Water Co., 9 id. 527;
Ashurst's Appeal, 60 Pa. St. 290;
Green v. Felton, 84 N. E. (Ind.) 166;
East, etc. Co. v. Merryweather, 2 Hem. & Miller, 254.

And, for the sake of completeness, it may further be added that the Act of 1880, requiring ratification to be made by a two-thirds vote of the stockholders of a mining company, was repealed by Stats. 1905, page 74 (*S. O. Co. v. Slye,* 164 Cal. 445).

Looking, then, to the resolution in question, we note that in so far as its subject matter is concerned, it was one which the board of directors could have adopted; so far as Mr. Noyes was concerned, though a director, yet he was not a majority stockholder of the company, and did not vote upon the adoption of the resolution; his interest in the subject matter was not concealed from the directors, but was perfectly open, fully disclosed to, and thoroughly understood by them; and what Mr. Noyes had done for the welfare of this company would have been well worth the entire sum of $45,000, if he had ever been fortunate enough to have received that money. This resolution recites that Mr. Noyes expended large sums of money; where is there any proof in this record that he did not expend large sums of money? Is not the proof directly to the contrary, that he did expend large sums of money? This

resolution recites that he rendered valuable services in securing the fifty cent lease of January 15, 1913; where is there here a syllable of proof to show that he did not render valuable services in securing that lease? In point of fact, the entire record in this cause shows, not only that he did render services to this company of incalculable value, but also that those services had the added merit of saving this company from utter shipwreck and destruction. The resolution recites that he will in the future render valuable services to the company; where is the proof that he did not intend to render, or that he did not render such valuable services? How, indeed, can any inference of fraud be drawn from any imperfection in the recitals themselves contained in this resolution? Upon what definitive basis, indeed, is it then to be claimed that this resolution was infected with any fraud? So far as the amount involved is concerned, the question as to whether $45,000 was reasonable or excessive was purely a matter of judgment and individual opinion; and although opinions, swayed perhaps by personal motives, may differ as to this amount, yet the decision of the matter had to rest somewhere, and that decision was made by the legally governing body of the corporation. If the claim be made, as undoubtedly it will be made, that the members of this board were dominated by Mr. Noyes, and that they were his "biddable board", we shall have the greatest difficulty in stating a negative sufficiently emphatic to do justice to our feelings without the use of language inconsistent with the dignity of this court. This aspect of the matter will be discussed more at length hereafter; it

is enough to say now that domination is one thing, but the cleavage of sentiment within a corporation is quite another thing, that Mr. Noyes was not a majority stockholder in this corporation, and that his "domination" might well be illustrated by his original failure to persuade the stockholders or directors to install the cyanide plant in 1907, and by his subsequent failure to induce them to consent to assessments, and by his failure to persuade Mrs. Willis to advance money for the plant, and by his failure to persuade the Mills stock to assist, and by his failure to procure any of these people to participate in the purchase of Section 5. The plain, though unpleasant, truth is that while all of these people hung back and refused to be "dominated" by Mr. Noyes, and while he was compelled to carry on the work of rehabilitating this corporation alone and unaided, he was performing services wholly beyond the scope of any duty resting upon him, whether as stockholder or as director, and that when he laid before the principal stockholders and explained the burden that he was bearing, and stated that he felt he was entitled to compensation for his labors, he was assured that he would have it. How, at this late day, when this corporation has been rescued from bankruptcy, and while not one-half of these forty-five thousand dollars have been paid to Mr. Noyes, it can be contended that any fraud inhered in this resolution, passeth, we think, all human understanding.

Where, indeed, is the proof that the payment of the $11,000 for which Mr. Noyes gave his receipt on February 27, 1913, and as to which the cash book of this

company contains a proper entry, was not made in consideration of ore which had been delivered by Mr. Noyes to the company, or which was ready for delivery and awaiting orders? Where is the proof that this company did not net $12.00 per ton out of ore which it secured from William S. Noyes at fifty cents per ton? Where is the proof that this $11,000 was not immediately returned to the company's treasury, or that it lost a dollar by that transaction? The proof shows that these transactions were beneficial to this company; that the payment of this $11,000 occasioned no loss to this company, because it received the ore equivalent of that money; and the fifty cent lease resulted in profit to the company. And the entire transaction was without any of those features of affirmative secrecy or concealment which make their appearance in so many of the decided cases; there was no secrecy, and a receipt was given for the money, and an entry was made in the cash book; and this we submit was quite sufficient publicity—a newspaper article was not essential. And under all the circumstances there was no excessiveness in the award; if there were, it was upon paper only and not in fact, because that excessiveness never was developed into action; and all that Mr. Noyes received under this resolution was $24,500. In view of all these considerations, what rational basis have these complainants for the claim that this resolution was a plan formulated by Mr. Noyes with the aid of his "co-conspirators" to "plunge this company into debt?" Surely, the payment of this first $11,000 did not have this effect; the company got its equiva-

lent in ore; subsequently through circumstances with which we are familiar, the money itself went to the company to pay off the Osborn shortage; and the only one who became indebted was, not the company to Mr. Noyes, but Osborn to Mr. Noyes. And so far as the rest of the payments under this resolution were concerned, they were purely dependent upon the success of the company in its enterprise, upon "the earnings of this company," and were themselves only partially received.

3. The agreement of November 19, 1913.

It will be remembered that in the fall and winter of 1912-3, the Presidio Mining Company was in a most precarious condition—upon the verge of collapse; that its only hope of salvation lay in the establishment of the cyanide plant; and that the installation of this plant was the ardent desire of the man that this complainant says was desirous of looting and plundering this company. It will also be remembered that while he was in Texas battling to establish this plant, the depressing intelligence came to him of the shortage in the company's treasury of over $10,000 caused by the peculations of Osborn; that this information came to him at the very time when funds were most needed for the betterment of the company and for its hopes for the future; that upon receipt of this information he promptly wrote the principal stockholder, Mrs. Willis, urging a reorganization of the directorate of the company in order that a similar misfortune might not thereafter occur; and having done this, he then proceeded as best he could with the establishment of

the cyanide plant, and with the acquisition of Section 5—the latter with the hope in his mind that thereafter, when the company was able to do so, it might take that section off his hands at cost. These events occupied the greater part of the year 1913; mining, in general, is speculative and uncertain, as the Supreme Court points out in *Patterson v. Hewitt;* Section 8 was itself a typical instance of this uncertainty, being a pocket mine; how far Mr. Noyes' plans for the betterment of this company would ultimately be successful was therefore a matter of uncertainty; and during 1913 everything in connection with the enterprise was in a tentative state. The fifty cent lease of January 25, 1913, was for one year only, with a privilege to either side of termination upon a thirty days' notice; one of the thoughts in the minds of the directors with relation to the resolution of February 15, 1913, was its essentially tentative character; and all parties were looking forward to the time when a definitive *modus vivendi* should be established between Mr. Noyes upon the one side and the Presidio Mining Company upon the other. And it was this state of things which led up to the agreement of November 19, 1913. All of the arrangements prior to that date were temporary in character, and this agreement of November 19, 1913, consummated and adjusted the rights of the parties; and it was a reorganization of its obligations by the company. At the time when the contract was approved and entered into, Mr. Noyes was not in the State of California, and consequently was not present at the meeting in question and the corporation was represented by the other directors. From the beginning of

this record to the end, not a particle of proof has been produced to show any coercion of any of these directors, direct or indirect, by the man upon whose head this active complainant, looking forward to "control the management" (letter Overton to Gleim, 623-4) has poured the vials of his wrath; and not until clamorous vociferation shall be judicially regarded as supplying the absence of tangible proof can it be pretended that any of these directors were in any way coerced, or "dominated" by the absentee into the making of this agreement. The agreement provides that Mr. Noyes shall furnish the ore, which is to be paid for according to the methods adopted in the contract, and that the net profits are to be equally divided; and the record before us shows that this contract was not only essentially fair in itself, but was fairly executed. This flows, we submit, to go no further, from the application to the relations between Mr. Noyes and the company of the equitable principle that equality is equity; and there is nothing in or about this contract upon which can fairly be predicated a claim of an error of judgment or mistaken view, to say nothing of an accusation of fraud. And during the hearing, as the result of a voluntary and spontaneous suggestion of the learned judge of the court below, a firm of certified public accountants was selected by the learned judge to make a full investigation of the affairs of the Presidio Mining Company. Neither side had suggested the appointment of these accountants; that act was the act of the learned judge himself; and in referring to the character of the accountants, and the sort of service which they were accustomed to

render, the learned judge, speaking from past experience, commended these accountants in the highest terms applicable to men in their profession. The result was that these highly commended public accountants proceeded with their investigation of the affairs of this company, and among other things investigated this contract of November 19, 1913. Among other inquiries put to them was an inquiry as to whether the contract of November 19, 1913, was or was not a fair and judicious contract, and whether the arrangement represented by that contract resulted in benefit or detriment to the Presidio Mining Company, and whether the terms of the contract were fairly carried out (Record Vol. 4, page 974). And in reply to this, these experts said:

> "Assuming that the company could not avail itself of the opportunity to acquire the property now known as Section 5, the contract of November 19, 1913, was fair enough. Should its operations have proven unprofitable, it could have been terminated on thirty days' notice. We are of the opinion that the reduction of cost of mining of $1.00 was hardly fair in the circumstances. We are also under the impression that the undertaking by the company to pay $45,000, for securing the lease was neither judicious or equitable. Further, we cannot fully approve the segregation of profits on the basis of a stope assay. We think a flat payment of some kind, so much per ton, or so much per foot, would be less open to objection. Although the payment of $45,000 appears to us as excessive, the arrangement has, on the whole, resulted in benefit to the company. There has been a steady reduction in average yield per ton from Section 8, at which yield it would have been impossible to continue operations for any great length of time, and the mixture of higher grade ore from Section 5 has been essential and necessary. * * * The terms of the contract of November 19, 1913, between William S. Noyes and the Presidio Mining Company have, in our opinion, been

> fairly carried out. * * * The methods used for estimating tonnage are in accord with mining practice at small mines. The sampling is done in a systematic and practical manner and conforms to the terms of the contract. The assaying apparatus is good, and the assaying is conducted in a regular competent and systematic manner." (Record Vol. 4, pp. 987-8, 989.)

Such are the views of these experts, spontaneously appointed by the learned judge of the court below, and highly commended by him for the superior character of the work which they do. Does the foregoing quotation convey to the mind of a fair man the slightest, faintest, remotest suggestion of any sort of domination or unfairness? These are the views of wholly disinterested outsiders, quite without any interest in this litigation upon either side, and who acted in all that they did as the representative, not of either of the contending parties, but of the presiding judge himself; they say that this contract was fair and that its terms have fairly been carried out. What principle of equity demands anything more than this? And it will be observed that even as to the item of $45,000, not one-half of which was actually received by Mr. Noyes, they speak in a hesitating and most guarded manner; they are "under the impression" that the undertaking to pay this money for securing the lease was "neither judicious nor equitable"; and further along they state that the payment of $45,000 "appears to us" as excessive; but nowhere do they intimate that this $45,000 payment is to be classified otherwise than as an idea as to which different men might entertain different impressions; nowhere do they intimate that this item belongs in the

category of fraudulent items; and they concede that "the arrangement has, on the whole, resulted in a benfit to the company". We think, and we respectfully submit, that the views of these disinterested and competent investigators should be decisive upon all questions as to the propriety of the agreement of November 19, 1913.

There is, however, one aspect of this contract which should be called to the attention of the court, as furnishing a general corroboration of the position taken by the defendants in their pleadings; and that is the concession contained in the resolution adopting this contract to the effect that Mr. Noyes had offered to the corporation the opportunity to purchase the Silver Hill Mine at the cost thereof, but the company was unable to purchase the same and declined to do so because of its financial inability; and this admission of financial inability is fully corroborated by all that we know of the condition of the company during the winter of 1912-13 (*Hatch v. Coddington,* 95 U. S. 48).

It should be observed that there is no finding of which we are aware that Mr. Noyes' services, mentioned in the resolution of February 15, 1913, were not, under the then existing circumstances, worth $45,000. We know that the company did receive from him assistance and financial support, both prior and subsequent to February 15, 1913, which he could not have been compelled to furnish, except upon terms fair to him; and all of these transactions were entered in the records of the company, and there disclosed. All that Mr. Noyes did in securing the Silver Hill Company's stock, and in

submitting the 50¢ lease to the directorate was voluntarily, not compulsorily, done to maintain the Presidio Mining Company as a going concern, in the hope and belief that in this way the company could be carried forward to prosperity and success; and this thought shines through the letter of January 23, 1913, and makes it clear that Mr. Noyes' desire, motive and purpose was to put the company into a condition which he expected would enable it successfully to continue as a going concern. The continued operation of the company as a going concern for any considerable length of time was impracticable; the time was fast approaching when it must inevitably have ceased its active existence; and in view of Mr. Noyes' dealings with the owners of the Silver Hill Company, the lease of January 25, 1913, and his direct financial assistance in loaning $10,000 to the company in January, 1914, it can only with justice be said that his whole course of conduct repels the thought of fraud, produced such benefit to the company as to rescue it from ruin, and demonstrates that in its conception and consummation, the best interests of the company was the controlling motive. Why, then, should not Mr. Noyes make what Klink, Bean and Company have called a fair contract? And, upon the whole, taking into view these purposes and objects of Mr. Noyes, the lack of concealment, the omission of any proof that any director was improperly influenced by him, the fact that Overton, a tardily dissatisfied man, after having slept for three years, suddenly looks forward to the "control of the management", and the ratification by the stockholders in October, 1913,—taking

all of these matters into view, who can justly find fraud or any good reason to overturn the contract that the disinterested agent of the learned judge below concluded was a fair contract? As remarked in *Childs v. N. B. Carlstein Co.*, 76 Fed. 86, 91-2:

> "The fact that Miller was the president of the corporation in no degree impairs his title to the securities which he holds for the payment of his just claims against the company. That he is its creditor is clear, and that he is also contingently liable as indorser or guarantor of its indebtedness to the banks and others, and has otherwise become personally liable for debts of the corporation in case the latter should fail to meet its obligations, is established beyond all question. That he incurred these obligations in an honest endeavor to aid the company in which he was interested, and doubtless at times when it was in extreme need of financial assistance, and that, so far as appears upon the hearing, he has taken no advantage of its necessities or of his position as its president and director in obtaining the security he holds, and, in short, that he is an honest creditor of the corporation, are all facts which sustain his claim to payment of his debt. The fact that he is the president of the company is neither legal nor equitable ground per se for depriving him of the right to enforce securities honestly obtained, or putting him upon a worse footing, in any respect, than other creditors of his debtor. This has so long been the law of Michigan, as held by the Supreme Court of the state, and equally the doctrine of the Supreme Court of the United States, that it may be fairly regarded as legally notified to all persons dealing with corporations. Kendall v. Bishop, 76 Mich. 634, 43 N. W. 645; Oil Co. v. Marbury, 91 U. S. 587. In the latter case it is characteristically said in the vigorous language of Mr Justice Miller:
>
> "'While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for the dealings in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation, when the

money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid and of the extent to which it may be safely given.'

"These remarks are strikingly applicable to the relations of defendant Miller to the corporation. He was its president and a large holder of its stock. It is conceded that no one had a greater interest in its success, and therefore none could have a stronger motive than he, in promoting, by all means in his power, the conduct of its business and the maintenance of its credit to which he seems to have pledged his individual property to a large amount. It is obvious, also, that the only fund to which he can resort for payment of his debt is the property of his debtor. There is no equitable principle which would require him to stand by in silence, and witness the appropriation by others, who have no lien, of the property which his courage and means have preserved. The enforcement of his security is the only mode left him to make his money, and this is obviously, upon the facts stated in the bill, a scanty fund. But, whatever its amount, he should not be restrained from realizing it."

Upon what principle, accessible to this complainant, is he to criticise the agreement of November 19, 1913? That agreement provided for an equal division of the net; and at page 608 of the record, the complainant tells us "I have contracts on that very basis for one-half of the net"; what sudden access of virtuosity now infects him that a contract entirely proper where he is concerned becomes something hideous where another is involved? What quality of sincerity can be perceived in a claimant for "control of management" when we observe his profession so flatly contradicted

by his practice? Is it agreeable to equity that he should be permitted to blow hot and cold to the fairness of an equal division of the net? To use the language of Judge Purnell *(In re Eagles,* 99 Fed. 695, 697), is it agreeable to equity that this complainant should run with the hare and hold with the hounds?

4. There was no unfairness in the apportionment of bullion.

The agreement of November 19, 1913, provides the procedure by which the net value is to be determined; and the apportionment of bullion as between Section 8 and 5 was the subject of inquiry during the trial below. On that subject various witnesses testified as to the propriety of the method of apportionment and it is submitted that a fair analysis of their testimony will develop the absence, not only of any fraudulent conduct, but of any unfairness. The insinuation that the apportionment of net bullion from Section 5 was fraudulently made had no better foundation than the alleged circumstance that the computations were made by Mr. William S. Noyes, as if it were not customary for the seller of goods to render a bill for the same, and ignoring the fact, shown by the evidence, that to Mr. Noyes' bills for ore sold these computation sheets were attached and the computations could therefore be verified by anyone by the application of simple arithmetic (946-7). Mr. B. S. Noyes testified that he had himself worked on many of these computations, and had checked nearly all of them that were made by Mr. William S. Noyes. His testimony in that regard is, we submit, not to be discarded upon the theory that

he was interested in the outcome of the litigation, because his interest in that regard is certainly no greater than that of the complainant who is unable to conceal his anxiety to "control the management" (letter Overton to Gleim, 623-4); nor is Mr. B. S. Noyes' testimony to be disregarded, we submit, because he happens to be related to Mr. William S. Noyes *(People v. Hertz,* 105 Cal. 660, 662-3; *People v. Shattuck,* 109 id. 673, 681); and decided cases are numerous in support of the proposition that no inference of fraud can properly arise from the fact of relationship *(Dunlap v. Bournonville,* 26 Pa. St. 72; *Gray v. Galpin,* 98 Cal. 633; *Conry v. Benedict,* 108 Iowa 664; *Shauer v. Alterton,* 151 U. S. 607; *Walker v. Houghteling,* 120 Fed. 928; *Schultz v. Hoagland,* 85 N. Y. 468; *King v. Russell,* 40 Texas 124; *Smith v. Mason,* 122 Cal. 426; *De Garca v. Galvan,* 55 Texas 53; *Wood v. Broadley,* 76 Mo. 27; *Car v. Breeze,* 81 N. Y. 587; *French v. Holmes,* 66 Maine 195; *Wallace v. Pennfield,* 106 U. S. 264).

Independently of this, however, the Klink Bean Company report makes it clear that no claim of fraud or unfairness can justly be predicated upon this bullion apportionment; that report shows that these apportionments were honestly made. At page 1, the report states:

> "An examination was made of the mine assays of both No. 5 and No. 8 for the years 1913, 1914, and 1915, with a view of arbitrarily correcting such samples as appear in the records abnormally high in comparison with the general averages." (979)

A summary is then given, "which", the report continues, "is slightly in favor of No. 8 under the present

method'' (980), which shows that abnormally high assays were not elminated from Section 8 assays but were allowed to stand in its favor. The report further states that:

> ''The system by which the bullion apportionment is figured as between Section 8 and Section 5 is not accurate. Under the existing conditions, however, it is as nearly so as can be made. In this connection, we submit the following conclusions and comments based upon observations of existing conditions and from information elicited at the property. That the sampling is carried out in a systematic and practical manner and conforms to the terms of the contract.
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> ''That the tonnage estimates from No. 5 are being kept in the usual mine fashion, where no weighing apparatus exists. The sampling for both mines is done in the same manner and method, and the adjustments made to both properties according to the mine assay percentage. Over a long period the law of averages should tend to equalize results. To change these methods for the purpose of obtaining more accurate results of assays, weights and reconciling, it would be necessary to adopt either of the following plans:
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> ''1: To maintain an engineering and sampling force at a cost of $5000 to $6000 per year and increase the cost of mining by reason of separate handling.
>
> ''2: The building of an automatic sampling and weighing plant at an approximate cost of $25,000.'' (978-9)

And at page 989 of Volume 4 of the record, the report further states:

> ''The methods used for estimating tonnage are in accord with mining practice at small mines. The sampling is done in a systematic and practical manner and conforms to the terms of the contract. The assaying apparatus is good, and the assaying is conducted in a regular, competent and systematic manner.''

The complainant, Overton, undertook to say that Mr. Gleim, the superintendent at the mine, had told him that Mr. Noyes did not desire a detailed statement from him; but it was shown that in conducting the affairs of the company, in addition to making such trips to the mine as he deems necessary, Mr. Noyes receives from the local superintendent a copy of the weekly letter to the secretary, with full details of work done, including the ore milled with assay sheets attached. Monthly there are a large number of reports furnished consisting of seventeen forms which give minute details of cost of operations; and indeed, we submit, that no fair man can examine the book of exhibits on file herein without reaching the conclusion that the contents of this book furnish a most complete and satisfactory answer to the claim of Mr. Overton that detailed statements were not desired by Mr. Noyes. The view of Klink Bean and Company is, also, quite to the contrary. In speaking of these reports, Klink Bean and Company take occasion to say, at page 992 of Volume 4 of the record, that:

> "The company's records have been laid out carefully, and the blank forms for reports show the results intelligibly. Costs are kept in minute detail, in fact, more so than is commonly found at small properties. Some changes can be made looking toward a decrease in the amount of labor entailed by the present method."

And finally, in speaking of the contract of November 19, 1913, the Klink Bean & Company report declares (Vol. 4, pages 987-8) that:

> "Assuming that the company could not avail itself of the opportunity to acquire the property now known as

> Section 5, the contract of November 19, 1913, was fair enough. Should its operation have proved unprofitable, it could have been terminated on thirty days' notice. We are of the opinion that the reduction of cost of mining of $1.00 was hardly fair in the circumstances. * * * The terms of the contract of November 19, 1913, between William S. Noyes and the Presidio Mining Company, have, in our opinion, been fairly carried out."

In this connection, it may further be pointed out that the record in this case shows, not only in this matter of bullion apportionment, but also in the matter of the $1.00 differential, the tramway contract, and the matter of salaries, hereafter to be considered, efforts on the part of those accused of this alleged fraud to do things which they thought fair in themselves and for the benefit of the Presidio Mining Company. The establishment of the cyanide plant through the ability, energy and credit of William S. Noyes is one illustration of this; and the efforts of those concerned to hit upon such fair apportionment as between the Presidio Mining Company and Mr. Noyes as the owner of Section 5 may be regarded as another illustration to the same effect. Nothing, however, in this world is easier than to stand apart and criticise another man's efforts; nothing is easier than to assume an aspect of wisdom, and sagaciously, or otherwise, wag the head at the constructive efforts of other men; and we have had much of this sort of nonsense in the cause at bar. The expert who investigated the conditions surrounding this situation has told us that the installation of the cyanide plant was beneficial to the Presidio Mining Company, and that the methods adopted to ascertain Mr. Noyes' royalties were fair. If we assume that in establishing

this cyanide plant, or in seeking to hit upon a fair apportionment of profits, the directorate of the Presidio Mining Company, or the persons accused in this bill of complaint, made an error of judgment, whether as to methods, or otherwise, will any fair man take it that this was a fraud? Let us assume it to be the law that the directors of a corporation are trustees or quasi trustees; that general statement, like most general statements in the law, is not without its qualifications; but conceding them, for argumentative purposes, to be trustees, they are not trustees for the stockholders at all, but are merely trustees for the corporation; and in any transactions or dealings between Mr. Noyes and the corporation, these directors would act as the trustees for the corporation, and would conserve its interests in any contract made. When the fifty cent lease was executed in January, 1913, Mr. Noyes was not only not an officer of the corporation, but he was not a director—he was a mere "salaried employee" (amended bill, par. XIV, page 57), subject to dismissal or discharge at any moment. The directors, in these matters, and under the situation as it then existed, did the best for their company that was then possible, and we do not need, really, the commendations of Klink Bean & Company upon the propriety and fairness of their dealings—the record generally demonstrates that; but what better method of relieving the Presidio Mining Company has been proved in this cause by the complainant? It is very well to stand apart and owlishly criticise other men's methods; but taking a reasonable view of the situation, position and finances of the Presidio

Mining Company, the decline in silver and the depreciation in the quality of the ore, who dare say, not that the establishment of the cyanide plant or the arrangement as to the apportionment of bullion was an error of judgment, but that it was a fraud? And who has established here any superior remedy for the ills that the company was then laboring under? Mr. William S. Noyes, not impressed by any duty or trust which the complainant can successfully lay a finger upon, acquired Section 5 by his own credit and at his personal risk, at a time when the Presidio Mining Company, with a depleted treasury, was facing ruin and bankruptcy, and wholly unable to purchase Section 5 or any other section; and having so acquired Section 5, Mr. Noyes, though not obliged to do so, nevertheless entered into the fifty cent lease which was subsequently modified by this agreement of November 19, 1913; and in these transactions, the directors and Mr. Noyes endeavored to reach a result fair and reasonable to all concerned, having in view the situation and conditions then existing. As observed by the Supreme Court of California

> "this question must be determined, not in the light of subsequent events, but upon the circumstances existing at the time of the negotiations and the execution of the contract".
>
> *Colton v. Stanford,* 82 Cal. 351, 403.

If we are to assume that these transactions, and particularly the methods adopted to apportion this bullion, present an error in that regard by the directorate, it would still be an exceeding far cry from an

error of judgment to an actual fraud; and Klink Bean & Company, so far from describing these matters as fraudulent, or exhibiting an error of judgment, actually described them as being fair, and conceded that the contract was fairly carried out. What better method, indeed, that will withstand a moment's analysis, has the complainant established? He can sit back now quite comfortably, in his revolving chair, and with great sagaciousness criticise the efforts of men, in the midst of financial storm and stress, battling to rescue this company from complete shipwreck. He forgets that the actions of these men should be judged in the light, not of subsequent events, but in the actual conditions which, at the very time and place, surrounded and encompassed them; but so far from presenting a further rational remedy for the ills of the Presidio Mining Company, or any other more satisfactory method for the apportionment of this bullion—a remedy or a method fair to all concerned and careful of the rights of each,—their lips are sealed. As observed by the Supreme Court of New York:

> "The method adopted by the trustees to ascertain what was a fair amount of royalty—they having determined in the first instance that a royalty should be paid—seems to have been a practicable and fair one. Testimony has been taken, and tables introduced in evidence, showing in detail the methods used and the results arrived at. No successful criticism has been made by the plaintiff upon the method used; nor has he shown any better method of arriving at the amount of savings, or at what would be a fair royalty, if any royalty should be paid, although he objects on the ground that the royalty is excessive. Certainly a great saving has been shown in the expense of manufacturing horse shoes by this company since the

adoption of these new machines or this new process. The defendants claim that this saving of expense came from the adoption of the new process or the new machines secured to the company by the use of these three patents. The plaintiff denies this, yet he does not dispute that a saving has been effected, and he does not show that it was reached by any other means; so I must and do conclude that the saving was accomplished by this new process, or by the use of these new machines secured by these patents, and that the royalty agreed to be paid was fair, and not excessive. In any event this matter was something within the province of the board of trustees to ascertain and act upon. They were acting within their powers. They have not been shown to have exceeded their powers, nor have they been shown, in regard to this royalty, to have acted unjustly, fraudulenty or dishonestly either toward this plaintiff or the defendant, the Burden Iron Company; but the expenses have been shown to be greatly reduced, and the income to have been increased. They ascribe this to the adoption of this new process, and the court agrees with them."

Burden v. Burden Iron Co., 80 N. Y. S. 390, 396-7.

5. No inference disadvantageous to these defendants can be drawn from the history of the dollar differential.

It will be remembered that the contract of November 19, 1913, provides the mode in which the net value of the ores reduced, shall be determined. Among other stipulations, it provides for the determination of the gross value, and then proceeds to say:

"From such gross value, the actual cost of mining and milling, less the sum of $1.00 per ton for the smaller cost of mining in said Silver Hill Mine as compared with the mine of party of the second part, shall be deducted, and the difference shall constitute the net value of the ores so taken during that period by party of the second part from said Silver Hill Mine." (491)

This dollar differential obtained from November 19, 1913, to August 31, 1914—a period of 9½ months—when it was waived by Mr. Noyes; and as we have suggested as to the method adopted for the apportionment of bullion, so with this dollar differential; the real question here is not so much whether the directorate was right or wrong in providing for this differential, nor whether they did or did not commit an error of judgment in regard to it, but whether a provision of this character, in a contract of this type, made under the then existing circumstances, can justly be regarded as an act of fraud. Certainly, the allowance of this differential is a matter upon which opinions may well differ; the record does show, notably in the testimony of Mr. Gleim, that a difference in the cost of mining as between the Silver Hill Company and the Presidio Company did exist, and whether the board of directors was right or wrong in estimating the difference at $1.00 per ton, it can scarcely be said that because of this they were fraudulent co-conspirators with Mr. Noyes in a concerted plot to loot and plunder this corporation—to use terms common upon the lips of this complainant. Klink, Bean and Company in their report express themselves upon this subject in the most guarded maner; evidently, the last thought in their minds was that this differential was either "excessive" or "fraudulent"; and the view which they took of the matter was, not that such a differential would generally be unfair, but that they thought that it was "hardly fair in the circumstances" —a view which we think eliminates from consideration the propriety of any claim of any fraud in this con-

nection. It was shown, however, by the testimony of Mr. Gleim that the total difference in cost of mining ore in Section 5, as compared with an equal quantity from Section 8, in dollars and cents, from January, 1913, to August 31, 1914, was $11,943.35, and from August 31, 1914, to June 30, 1916, it was $47,587.14—making a total of $59,530.49. Of that amount $16,161.50 was allowed, and the balance of $43,368.99 (from which perhaps fifteen per cent should be deducted) was not allowed—that is, it was waived by Mr. Noyes. To August 31, 1914, when the allowance of the dollar deduction terminated, the difference in cost had amounted to 88.9 cents per ton in favor of Section 5. It continued for the latter period at about the same rate. The differential for tramming and hoisting ore was 45 cents per ton in favor of Section 5; and that would leave 44 cents per ton spent in development work in Section 8. The amount expended in development work in Section 8 from January 1, 1913, to June 30, 1916, was $20,630.40.

The claim was made below that "the one dollar differential is also inherently wrong"; and it was stated that "one dollar is arbitrarily deducted from Section 5 tonnage". But this cannot be, because the contract does not provide for the absurdity of subtracting dollars from tons; what it does provide is that from the gross value in dollars of the ore from Section 5, there shall be deducted the actual cost of mining less the sum of $1.00 per ton; but in the deduction made below we look in vain for the essential factor of the gross value in ore from Section 5; and with that eliminated it was impossible

for complainant to arrive at correct results. The example put below was as follows:

> assume 3000 tons of ore produced in any one month, 2000 from Section 8, and 1000 from Section 5. With an operating cost of $6.00 per ton, the 3000 tons cost $18,000. $1.00 is arbitrarily deducted from Section 5 tonnage: the 1000 tons, therefore, would be charged $5000, making 2000 tons from Section 8 absorb the remaining $2000 or $6.50 per ton, a differential of $1.50 instead of $1.00. (1016-7.)

This view, we think, is erroneous. If we assume that 1000 tons from Section 5 produced $10,000 gross value in bullion; and if the mining costs were assumed equally ($6.00 per ton), $6000 would be deducted from the $10,000, leaving four thousand dollars for division—$2000 to the company and $2000 to Noyes. But, under the contract, only five thousand dollars would be charged against the gross value of $10,000, leaving $5000 for division, $2500 to the company and $2500 to Noyes. The company has, therefore, $500 or fifty cents per ton returned to it in the division of the larger net, and the differential is $1.00 per ton, and not $1.50 per ton as the complainant erroneously asserts. In a word, to repeat what was said above, in complainant's formula we look in vain for the essential factor of the gross value of the ore from Section 5, dealt with and contemplated by the contract of November 17, 1913. It may be added that no concession is made by these defendants that this dollar differential was either "inherently wrong" or an "arbitrary deduction"; but even upon the assumption that it was an "arbitrary deduction", which was "inherently wrong", it was nev-

ertheless a matter of business judgment, and by no manner of means a fraudulent act.

Taking the view most favorable to this complaint, this particular matter would fall, we venture to think, into the same category with the lease referred to by Mr. Justice Harlan in the *Jessup* case *(Jessup v. Illinois Central Ry.,* 43 Fed. 483).

6. Nor can any inference disadvantageous to any of these defendants be drawn from the history of the tramway.

It will be remembered that without any financial assistance from the resident stockholders of the company, and with still less assistance from the non-resident stockholders, including the assignor of the complainant and the complainant himself, Mr. Noyes finally succeeded, in 1913, in realizing his long cherished purpose of installing the cyanide plant whereby the low grade ores of Section 8 might be turned to advantage and profit for the benefit of this company. But the mere plant, *qua* plant, would have of itself been of no effective service without its necessary appurtenances; and these latter indispensable features included the installation of the tramway and of surface tracks. The mill was situated about a mile from the mine outlet through which the ore came to the surface, and it was necessary to tram this ore from the mouth of the mine to the mill where it was reduced; and for this purpose this wire tramway was indispensable. Of course, when these improvements were made, the company had no funds wherewith to pay for them, and the principal stockholders were vigorously opposed to the thought of rais-

ing those funds by the process of assessment. It, therefore, became necessary for Mr. Noyes to obtain the necessary credits, and this he succeeded in doing. He made a contract with Gregg and Gleim, which appears in the record; and this tramway became a most effective instrumentality in reducing the operating cost; and the figures in this regard are given in the record. Later, the board of directors judged that it would be a good business policy to commute the contract with Gregg and Gleim. Greig and Gleim had certain rights under this contract, and so likewise had the Presidio Mining Company; and the commutation which was carried into effect was nothing more than a reorganization, or rather readjustment of the rights of both parties, effected through a new arrangement which was in no way injurious, but was to the interest and advantage of the company. It has never been pretended in this cause that there was the slightest trace of improper conduct on the part of Mr. Noyes or the other directors in connection with any matter or thing touching the installation of this cyanide plant and its appurtenances; on the contrary, in volume III, page 678, of the record, there is the plainest sort of concession by the complainant that all things in this regard were entirely regular. What, then, can possibly be legally or morally wrong with so commonplace a process as the commutation of a contract? Whether this contract could or could not be advantageously commuted was a question for the business judgment of the directors; they decided that matter in favor of the commutation; and it is not pretended that they were subject to any improper influence

or motive in exercising their judgment in this regard. It is submitted that there was no more impropriety in effecting this commutation than there would be in commuting a man's club or lodge dues, or his ferry transportation, or his taxes, or than there would be in a man commuting his damages for a death by wrongful act. The associated and analogous ideas of compounding or compromising a claim, or of composing with one's creditors, or of converting the right to receive a periodical payment into a right to receive a fixed or gross payment, carries to the mind no suggestion of any impropriety; the expediency of this commutation was a matter fairly to be judged by the directors in the light they had at the time they made their decision, and the correctness of their decision is not to be measured by subsequent events; but even were it to be determined by the course of subsequent events, it would still be true that their action not only operated no loss to the company, but was actually affirmatively beneficial.

Defendant's Exhibit KK (pages 922-3) admitted in connection with Mr. Gleim's testimony shows the respective costs of ore transportation and the saving to the company consequent upon the commutation; and when we turn to the Klink, Bean report (1007) we find it impossible to ascertain therefrom how, in what manner, or to what extent, the company was injured by this commutation. On the contrary, taking together defendant's Exhibit KK with the Klink, Bean report, we submit that no other conclusion can be drawn except that this commutation was beneficial to the company.

7. There was no wrong or iniquity in any of the dealings of Mr. Noyes with Gleim and Company, Benton Bowers, or any other person in Texas, of which this complainant can properly complain.

These transactions are all fully explained in the testimony, and quite without contradiction. They show that the dealings in question were entirely innocent, and without detriment of any sort to the company. They were not transactions to which the company was a party; they were not large transactions, any of them; and they all ceased and determined long ago. Throughout the entire period of time covered by these transactions, Mr. Noyes was working zealously for the interests of the company and to facilitate its operations; in these transactions he had no dealings whatever with the company; and the transactions themselves were perfectly open, wholly unconcealed, and frankly disclosed. None of these transactions had anything whatever to do with any of the transfers of the Osborn stock; none of these transactions threw any light upon Mr. Noyes' knowledge of the Osborn shortage; none of these transactions had anything whatever to do with the acquisition of Section 5; and these dead and gone transactions are resurrected merely for the purpose of furnishing what is imagined to be a makeweight in the case. They have no relation to any of the vital issues in the case, and, even if they amounted to anything in themselves, they should nevertheless be discarded because of their failure to establish the fraud relied upon in the complainant's pleading.

8. There was no impropriety, legal or moral, in the formation of the voting trust or pool, of which the complainant, or any other stockholder, could justly complain.

In *Fain v. U. S.,* 209 Fed. 525, it was laid down by the Circuit Court of Appeals for the Eighth Circuit, in substance, that there is nothing wrong in doing, or in combining or conspiring to do, that which is not prohibited by law; and in approaching this matter of the voting trust, even upon this plane, it would seem to dispose of this complainant's present criticisms by pointing out that such a voting trust is not prohibited by law. The combination of stockholders in good faith for their own protection will be recognized *(Hayden v. Official Hotel Co.,* 42 Fed. 875); and it is well settled that stockholders may combine their holdings for the purpose of electing directors and officers and controlling the management of the corporation,—as remarked in a California case,

> "proof that they (defendant stockholders) controlled the corporation would not make them liable as conspirators. Stockholders have a right to control the corporation of which they are constituents."
>
> *Fox v. Hale & Norcross Mining Co.,* 5 Cal. Unrep. Cas. 980, 996-7.

And in a recent Idaho case, the Supreme Court remarked:

> "The mere fact that Rockwell combined his holdings with other stockholders, and by that combination was able to elect officers, would furnish no reason for vacating or avoiding the action of such officers, or for enjoining the company from carrying out the resolutions of its board of directors. As we understand it, it is lawful and

> legitimate for one stockholder to combine his holdings with the holdings of one or more other stockholders for the purpose of the election of officers and controlling the management and business affairs of a corporation, and this is true until such time as the action of such stockholders becomes wrongful or unlawful or fraudulent, at which point the courts may take jurisdiction and act for the protection of the minority. Cook on Corporations, (5th Ed.) at Section 622-a, says: 'It is elementary law that stockholders owning a majority of the stock have a right to combine and control the election of the board of directors'" (citing authorities).
>
> *Weber v. Della Mountain Mining Co.,* 94 Pac. (Ida.) 441, 443.

And in the course of a careful opinion giving full consideration of the subject matter of a voting trust, and sustaining such a trust, the Supreme Court of California gave expression to much the same thought when it said that:

> "It is not in violation of any rule or principle of law for stockholders, who own a majority of the stock in a corporation, to cause its affairs to be managed in such a way as they may think best calculated to further the ends of the corporation, and, for this purpose, to appoint one or more proxies who shall vote such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect, and they may do this either by themselves or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Any plan of procedure they may agree upon implies a previous comparison of views, and there is nothing illegal in an agreement to be bound by the will of the majority as to the means by which the result shall be reached. If they are in accord as to the ultimate purpose, it is but reasonable that the will of the

majority should prevail as to the mode by which it may be accomplished."

Smith v. S. F. & N. P. Ry., 115 Cal. 584, 600-601.

Cited and approved in

Brightman v. Bates, 175 Mass. 105, 112.

9. **The complaint of the complainant and the finding of the learned judge of the court below as to "increases" in salaries are not justified by the disclosures of this record; the salary of the president of the company, which, for many years formerly, had been $200 a month was after an interregnum, altered to $150 per month, or $50 per month less than it formerly had been; the salary of Mr. Gleim was increased step by step with the increase in his responsibilities, and the magnitude of the business of the company; the other salaries were not increased; a voluntary reduction, still in force, was made in their salaries by the officers of the company in view of disadvantageous conditions surrounding the company; and none of the salaries of the officers of the company can fairly or reasonably be regarded as "enormous", or "exorbitant", or "excessive".**

When we examine the pleadings of the complainant dealing with this matter of salaries, we find ourselves confronted by a mass of hyperbolical exaggerations. One finds in the amended bill, paragraph 12, pages 47-8, an enumeration of the acts and deeds which the complainant charges against the defendants, followed by the declaration, "all of which acts, deeds, and transactions are hereinafter more fully set forth"; and what impresses one as peculiar about this enumeration is that it maintains a most significant silence upon the subject matter of salaries—salaries are here, in this

important and vital enumeration, wholly ignored, and are, apparently following the fashion in this class of cases, sought, later on in the pleading, and by way of afterthought, to be utilized as a sort of makeweight, thrown in for good measure.

In paragraph 13, pages 50, 51, a statement is made as to the salaries at the company's office; on page 66 these salaries are described as "exorbitant", "excessive, and wholly out of proportion to the services performed"; and on pages 66-7, the assertion is made that Mr. Noyes caused these salaries to be paid and that they will continue to be paid, as the consideration for the defrauding of the company by the directors,—an assertion which we do not hesitate to say is without a particle of proof in this record to sustain it. In paragraph 15, on page 71, the salary of Mr. Gleim is attempted to be dealt with; we are told that in December, 1912, his salary was $250 monthly; that it was raised in January, 1913, to $350 per month, and in August, 1913, to $450 per month; that these alterations in Mr. Gleim's salary do not appear to have been authorized by any resolution of the board; that they were coincident with the commencement of operations on Section 5, and that Mr. Gleim's salary was, during the year prior to September 24, 1915, reduced to $375 per month. In dealing with these salaries, this pleading of the complainant seems to disregard specific facts, and to supply the place of such facts by hyperbolically bombastic linguistic exaggerations; thus, in paragraph 14, page 66, we are told that these salaries are "exorbitant" and "excessive", but we are no-

where advised of any specific fact or facts justifying these very indefinite terms; and in the same paragraph, at page 68, for another example, we are told that these salaries are "enormous", whatever that term may mean; and, not to pursue this matter further, in the same paragraph, at page 70, for a final example, it is said that these salaries were "extravagant". We find no attempt made to go into the previous history of these salaries, or to contrast them with the salaries usually or generally paid for the same class of work, or to accompany these "extravagant" denunciations with any reference to the duties or responsibilities of those whom the salaries were paid to, or to indicate any standard by which to gauge the compensation of men who rescued this company from the "Slough of Despond" of 1912, and put it in the position it occupied in December, 1917, or, indeed, even to suggest any concrete matter of fact which would throw some real light upon these matters. And, so far as the pleadings are concerned, it is to be observed that all of the false coloring attempted to be thrown over this subject matter by the use of the epithets to which we have referred, fades out as the pleading progresses, and salaries which in the earlier portions of the pleading were "enormous", "extravagant", "exorbitant" and "excessive", finally dwindle down to "large" (par. 18, page 76).

We do not suppose that judicial notice will be taken, or could be taken, of the duties assigned, or salaries paid, to the officials of a mining company; and these, we venture to think, are matters of proof, and of fair

proof. But in the cause at bar, the conclusion as to the salaries before us seems to have been reached by a species of imaginative process, and in this matter of salaries, as in many other phases of the proof in this case, conclusions seem to have been arrived at by the *inadmissible* method of heaping assumption upon assumption, remote inference upon remote inference (*U. S. v. Ross,* 92 U. S. 281; *First National Bank v. Stewart,* 114 id. 224). As we read this record, we find it silent as to the alleged "enormity" or "extravagance" of these salaries; we find no proof that these salaries were "extravagant," "exorbitant" or "excessive". We find no attempt made, for example, to establish any discrepancy between duties and responsibilities upon the one hand, and compensation upon the other; or between the salaries prevailing previously in the history of the company and the salaries now complained of; or between salaries generally prevailing in like companies and those now asserted to be "enormous" and "extravagant"; one may, indeed, search this record from end to end, without finding established any standard whereby these salaries can be measured—it was not even attempted to be shown what were the salaries generally paid for similar work in companies of a similar character.

Whatever information is vouchsafed us by the showing made by this complainant upon this topic goes, we submit, in the direction of supporting the salaries now in question, rather than the reverse. If, for example, we look to the by-laws of the company for some light upon the general scope of the duties of the offi-

cers, we perceive that those duties and responsibilities were many and varied. Thus, the president is charged with the duty of presiding over all the meetings both of stockholders and directors, and, in cases where differences of judgment or opinion divide equally a meeting either of stockholders or directors, the responsibility is placed upon the president of determining all such matters by his casting vote; and it does not seem to require much penetration to understand that a responsibility of this kind may well be of the most serious and impressive character. So far as what one might call the documentary duties of the president are concerned, he must identify all certificates of stock by his signature, and it is his duty to sign all contracts and other instruments of writing which have been approved by the board of directors. But no funds can be expended without his signature; it is he who shall draw all checks upon the treasurer; and the financial responsibility involved in a duty of this kind is by no means a light one. In addition to this, the duty rests upon the president to keep in touch, not only with the actual affairs of the corporation itself, but with conditions which may, directly or indirectly, affect the business of the corporation and its welfare; he must be quick to see, and swift to realize, the effect upon the corporate interests of the vicissitudes of markets, the problems connected with labor, the course of legislation, the temper of the financial world, and other like matters which will readily suggest themselves; and this responsibility rests upon him, because the duty rests upon him to call the directors together whenever he

deems it necessary, and because he is charged, subject to the advice of the directors, with the direction of the affairs of the corporation. And not this, alone, but he is further charged with the performance of such other duties as may be imposed upon him by the by-laws themselves. He is, moreover, authorized to call special meetings of the directors at any time; and in the fair performance of this duty, he must steer a conservative middle course between the avoidance of unnecessary meetings, upon the one side, and the calling of such meetings whenever his general outlook upon the business world, or his knowledge of some internal happening within the corporation, may justify such a call. It must be plain that the due performance of these duties, and the satisfaction of these corporate responsibilities, call for a man of intelligence, far-sightedness, tact, good judgment, caution and business knowledge and experience; and when we consider that for some fifteen years Mr. Boyd had, while such president, drawn a salary of $200 per month (719), and compare, also, in partial corroboration, the disclosures of the minutes until Mr. Boyd's resignation (828, 833), it is difficult to understand how a salary of $150 per month, subsequently voluntarily reduced as we shall see hereafter, can fairly be described as "enormous" or "extravagant"; and for anything that this complainant has established to the contrary, the salaries paid by other similar companies for services of the same general character may well have been double or triple what was paid to the president of the Presidio Mining Company.

Continuing our search for some light upon this matter of salaries, it is to be observed that the position of superintendent is not provided for in the by-laws; that post was the creation of the board of directors; and Mr. Noyes occupied that post and performed its duties from 1883 down to February, 1918, when the existing receivership went into operation. Consequently, the duties and responsibilities of the superintendent are not defined in the by-laws; but when we consider the nature, character, extent and difficulties of the company's business, the operations carried on at a "lonesome, uninviting spot" (Klink Bean Company's report, 990), distant some 22 miles from the nearest place having a name (id. 990, 991), the uncertainties and conjectures incident to the operation of a pocket mine, the proper handling, operation and protection of expensive machinery, the care of an extended and intricate system of books, records and reports, the indispensable familiarity with the market, labor troubles, transportation troubles, supplies troubles, and the protection of the property from being "made the prey of political aggressors, labor agitators and land jumpers" (Klink Bean report, 992), we begin to see that the relation between the duties and responsibilities upon the one side, and the awarded compensation upon the other, is by no means so "extravagant" as to justify any reasonable person in describing $450 per month as an "enormous" salary; and even this complainant, who seems apparently to doubt that the laborer is worthy of his hire, is constrained to admit the reasonableness of this compensation in paragraph V of his supplemental bill (page 231 of the record).

When we turn to the by-laws to get some information concerning the duties of the secretary, we observe that those duties are manifold. He is required to keep a record of the proceedings of the board of directors and of the stockholders; he is required to keep the corporate seal of the corporation, and the book of blank certificates of stock, fill out and countersign all certificates issued, and make the corresponding entries in the margin of said book on such issuance; and whenever a corporate document requires a seal, it is his duty to affix the same. In addition to this, he must keep a proper transfer book and a stock ledger in debit and credit form, showing the number of shares issued to and transferred by any stockholder, and the dates of such issuance and transfer. These are the recognized duties of persons holding positions of this importance in a corporation, and they require, for their proper performance, intelligence, care, vigilance to avoid mistakes, and assiduity. But, in addition to these duties, the secretary of the Presidio Mining Company is required to keep proper account books; and as we look through this record generally, and examine with some minuteness the report of Klink Bean & Company, the truth becomes impressed upon us that the keeping of proper account books for this company, and especially since January, 1913, is a really serious and onerous task. Klink Bean & Company tell us (992) that

> "the company's records have been laid out carefully and the blank forms for reports show the results intelligibly. Costs are kept in minute detail, in fact more so than is commonly found at small properties";

and in view of these conditions, it is not too much to say that here, again, we have an instance where the laborer is entirely worthy of his hire. No particle of testimony has been produced by the complainant to show that the secretary of this company has ever been an incompetent person, or that he has failed to keep proper books of account; and since, in addition to his other duties, this difficult duty also has been adequately performed, we see no foundation for the "extravagant" claim that the salary of this secretary was "enormous". And the secretary is further required to countersign all checks drawn upon the treasurer,—a duty not without responsibility, and a duty which required the secretary to keep in close touch with the financial affairs and conditions of the company. He was, moreover, required to discharge "such other duties as pertained to his office"; these duties are not defined in the code of by-laws, but they would seem to include other duties than those enumerated, and other duties which would carry with them their own responsibilities; and he was further required to perform such other duties as were prescribed by the board of directors. In addition to all of this, it was made his duty to serve all notices required either by law or the by-laws of the company; and the course of corporate history teaches us that not infrequently the discharge of such a duty as this is attendant by very great, and sometimes unusual, difficulty. And when a fair survey is made of the position, duties and responsibilities of this secretary, particularly in a company operating under the conditions which surrounded the Presidio

Mining Company, we do not think that there is the slightest sincerity in the claim that the salary paid him was either "exorbitant" or "enormous".

Still further seeking to extract from this record some light upon this question of salaries, we may refer to the Klink Bean report. That document in which were formulated the results of the investigation of disinterested experts, appointed voluntarily and independently by the learned judge below with praises and commendations for their careful work, makes it very clear that the duties and responsibilities not only of the officers at Shafter, but also of those at San Francisco, were not such that their fair compensation should be whistled down the wind; and this report illustrates the care and labor bestowed upon the company's interests, activities and records. And so, too, with the experts who testified upon this precise matter of salaries (1074-1080); they gave us an idea of the salaries generally prevailing among similar companies for the class and character of work performed by Mr. Noyes; and when we contrast the salaries complained about here with the salaries referred to by these experienced men, all seriousness disappears from the complainant's accusations of "enormity" and "extravagance". Even the testimony of the complainant Overton and his wife is quite without a word of criticism of these salaries; he does not even criticise the increase in the salary of his witness, Kniffin (617).

We have hitherto spoken of the superintendent at the mine and his salary of $450.00 per month, and how he was permitted to maintain his residence in Califor-

nia. This complainant became a stockholder in 1908; and when he accepted his stock from Mr. Mills, the rearrangement of Mr. Noyes' position in the company had been in force for some seven years; but the complainant accepted his stock under these conditions, suffered some seven or more years to pass by without complaint, and although he knew, or could have known if he had so desired, the conditions to which we have just referred, yet he never offered any criticism of the situation until he commenced the present litigation with the real purpose in view to "control the management". In addition to the estoppel thus arising against this complainant in the matter of this salary of Mr. Noyes—salary which the complainant permitted without opposition to be paid to Mr. Noyes month after month and year after year,—it can, we think, be claimed with some confidence that the salary thus paid to Mr. Noyes was neither "exorbitant" nor "extravagant" nor "enormous"; but we venture to entertain the opinion that in appraising the propriety of this salary, the general history of the situation and position of Mr. Noyes with relation to the company may well be considered, together with "the value and extent of the corporation business * * * and the degree of responsibility which went with its management" *(Cowell v. McMillin,* 177 Fed. 25, 42),—these factors in the problem being developed as the result of Mr. Noyes' energetic administration for the welfare of the company. Mr. Noyes was a graduate of the School of Mines of Columbia University in New York City, and he practised his profession of mining engineer until

1883, when the Presidio Mining Company was incorporated, and Mr. Noyes was made superintendent of the enterprise. As the Klink Bean & Company report shows, he was immured in a lonely and uninviting spot in Texas, near the border, and some twenty-two miles from nearest place that even boasted of a name. The mine itself was a low grade silver mine, a replacement deposit in limestone,—a sort of pocket mine—situated some forty-five miles from the nearest railroad. This mine was the principal business activity in its immediate vicinity; but its relative isolation made important in its successful operation such elements as distance from market, successful handling of freight, the procuring of adequate labor in the various branches of the enterprise, the retention of labor, the protection of the enterprise from politicians and land grabbers, the continued maintenance and upkeep of both mine and mill, the importation and preservation of mining and milling supplies, the prompt settlement of labor pay-rolls, the maintenance of a system of reports of the progress and development of the work, the maintenance of a system of accounts, familiarity with the quality of the ore and the market for the product, and such other features as would naturally be observed or of interest in an enterprise of this character. From the year 1883 down to the year 1901,—a period of eighteen years, Mr. Noyes devoted his time exclusively to this enterprise, and was charged with responsibility for all mining and metallurgical operations, selection of equipment, expenditure of money, and general management. But in 1901, he made an arrangement with

Mr. Boyd, then the president of the company, whereby he was permitted to remove to San Francisco and act as consulting engineer and director of the mining operations, still retaining his title of superintendent, but with the same responsibility which had hitherto rested upon him. Since 1901, in addition to carrying on his profession as a general mining engineer, Mr. Noyes continued to look after the affairs of this enterprise, and to oversee the general management of its operations; and from 1901 to 1917 he kept in close touch with all of the details of the enterprise. He received weekly reports, monthly reports and yearly reports of the mine and its operations; he made as many trips to the property itself as were necessary for its proper management; upon these personal visits, he would stay at the mine sometimes for a few weeks and sometimes for a few months; and he saw to it that the mining operations were properly conducted. The weekly, monthly and annual reports which he received from the mine were very full and complete, giving full details of the work done and the amount of ore milled; and the assay sheets and tabulations were attached.

From 1883 to about 1900, the mine was profitable, the price of silver ranging from 55¢ to $1.10. From 1900 to 1905, the grade of ore produced diminished, and the price of silver was reduced; in 1905 dividends ceased; in 1907 the situation was so disheartening that the directorate ordered the mine closed down and the employees discharged; and it was only through the efforts of Mr. Noyes that this decision was revoked. From 1905 to 1912 no dividends were earned by the

enterprise; during that period there was a depreciation, not only of the ore, but also of the price of silver; but yet the cost of operation for the pan amalgamation plant then installed remained the same as it had been during the years when the ore was of a higher grade, and when the price of silver was higher; and at times that cost of operation increased slightly over what it had been during antecedent periods. In 1912 the condition of the company became such that Mr. Noyes renewed an effort which he had originally made in 1907, viz., he sought to impress upon the principal stockholders of the company the urgent necessity of transforming the company's plant from a pan amalgamation plant to a cyanide plant; when he originally made this suggestion in 1907 it met with no response from the stockholders, and the antagonistic views of the Eastern stockholders are fully reflected in the Mills' letters printed on pages 658-670 of the record; and when he renewed his efforts in this direction in 1912, while the principal stockholders agreed with his views and favored the change, still they declined to supply the funds requisite for the making of the change. In this emergency, unaided by any contribution from the stockholders, Mr. Noyes himself effected the change from pan amalgamation to cyanidation, principally upon credit and aided by such small sums of money as was available from the company's depleted treasury. The alteration of the plant cost nearly $80,000 in round numbers, but of that sum only about some $6000 came from the company's treasury, the depreciation of the ore to a point where it became

too poor to pay by the pan amalgamation method, the low price of silver and the peculations of Osborn, having reduced the available funds of the company to the low figure just stated. The cyanide plant was installed about July, 1913; and during the period from December, 1912, to July. 1913, no dividends were paid by the company—the company was, indeed, without any surplus or net profits from which to pay any dividends. During the period from July, 1913, to July, 1915, no dividends were paid by the company because of the necessity for clearing off the debt created by the change from the pan-amalgamation method to the method of cyanidation, the last note given in connection with this debt having been paid in 1916; and this burden of debt, together with the low price of silver during that period, prevented the accumulation of funds out of which dividends could have been declared. In July, 1915, the present litigation was commenced, and up to date no dividends have been declared because of the pendency of the litigation, and of the injunctions issued in the cause, although the defendants in the action offered (363), without success, to provide a dividend of $100,000.

In further considering the surroundings as throwing light upon the propriety of the salary paid Mr. Noyes as superintendent and general manager, it should be pointed out that in the year 1912 the company was doing a business of about $225,000 and handling about 21,000 tons per annum, which it was reducing by the pan-amalgamation method at a cost of approximately $9.25 a ton. When the cyanide plant was in-

stalled in 1913, Mr. Noyes further designed and installed improvements in the mill and plant, the greater portion of which consisted, in addition to the cyanide plant itself, of surface tracks and a rope tramway, about a mile in length. Since that time the business of the company has grown to such an extent that it was, at the time of the hearing below, between $400,000 and $500,000 per annum, the tonnage reduced was about 50,000 tons, and the operating costs were $4.53 in 1915, $6.24 in 1916, and $6.38 in 1917.

As further bearing upon Mr. Noyes' activities, and as illustrating the propriety of the salary which was paid him, it should be pointed out that between January, 1913, and December, 1917, the mining operations of the company were conducted in accordance with his recommendations and suggestions. In January, 1913, the company had an overdraft of slightly over $3000 at its bank. But in contrast with this condition, the following was the situation of the company on January 24, 1918:

Cash and bullion in San Francisco....	$63,912.03	
Liberty Bonds	25,000.00	
Cash in Savings Bank, Marfa, Texas..	15,000.00	
Cash in Marfa National Bank, Marfa, Texas	43,154.46	
Mining Supplies at Shafter Texas....	45,183.50	
Permanent Equipment since January 1, 1913	157,036.28	
Total.....	$349,286.27	(365)
Less amount due William S. Noyes as one-half the net from Section 5. The record does not disclose this amount, but the best possible estimate seems to be	$110,000.00	

For about a year after Mr. Noyes entered the service of the Presidio Mining Company, his salary was $300.00 per month; but in 1884, his salary was fixed at $450.00 per month; and that salary continued so fixed, and was paid to him, until November 1, 1914. At that time, in common with other employees of the enterprise, he voluntarily reduced his salary to $375.00 per month, in order to relieve disadvantageous business conditions resulting from the low price of silver; and he continued to draw that amount to and including January, 1918, when the receiver was appointed in this suit. When all of these facts are taken together, and when they are considered in the light of the opinions of the experts who were produced by the defendants, we cannot help but feel that no justification can be found therein for the claim that the salary paid Mr. Noyes as superintendent and general manager is either "enormous" or "extravagant". The history of the company makes it quite clear that but for him, his ability, energy, foresight and courage, this company would long ago have foundered; and we regard this, also, as a factor to be considered, along with the other factors relevant to the matter in hand, when determining, not whether Mr. Noyes' salary was judicious or injudicious, not whether it was too large or too small, but whether it was so shockingly large as properly to be described as "enormous" or "extravagant", and whether it was so shockingly large as to be suggestive, not of an error of judgment, but of a downright fraud.

Some additional light is shed upon the question under investigation, by a consideration of the past his-

tory of these salaries,—a consideration all the more appropriate because, as time went along subsequent to January, 1913, and the efforts of Mr. Noyes began to bear fruit, the magnitude of the business of the corporation very materially increased, but yet the salaries remained where they were, and were even reduced in amount. The proof shows that for fifteen years, the salary of the president had been $200 per month (719). As we have seen, Mr. Boyd resigned the presidency in December, 1907, and Mr. Peat was elected president and continued as president from December, 1907, to January, 1913 (458), at a nominal salary of $25.00 per month. This period of time from December, 1907, to January, 1913, was one of stress and struggle. The period opened with an operating loss of $15,505.91 and the closure of the mine, in December, 1907, and terminated with a bank overdraft of slightly over $3000 in December, 1912, with an operating loss of $2377.96, in January, 1913, and with the grim alternative of cyanide plant or dissolution, faced by unsympathetic and unresponsive stockholders. A not inapt illustration of the conditions weighing upon the company at the commencement of this period will be found in Mr. Osborn's letter of December 25, 1907, where he plainly tells Mr. Noyes that "it would be impossible for Mrs. Willis or myself to advance any funds to the company", advises Mr. Noyes that he must arrange to pay taxes and running expenses out of the proceeds of the bullion, and declares that "if, however, at any time you should fall a little short, the men at the mine and the merchants must wait until such time as the company is in funds"; and he concludes by warning Mr. Noyes

"to be particular and not overdraw our account with the San Antonio Bank", because he feared that in the event of an overdraft, an attachment upon the company property would follow at once (656-7). During this period, the fortunes of the company were at a low ebb; $30,000 would furnish a fair average statement of the utmost that the company earned during this depressing period, but of that amount something like $19,000 were invested in an internal combustion engine, and the balance was more than swallowed up in necessary repairs and improvements upon the property; and as we have seen, this period of ill fortune terminated with a bank overdraft of slightly over $3000.00 and with an operating loss of $2377.96 for January, 1913. Is it any wonder, then, that the salary of Mr. Boyd should have been discontinued during this period of depression?

Mr. Peat's salary was purely nominal—only $25.00 per month, and he failed to get all of that: "there was a period of six months I did not get my $25" (459);—but this, however, is merely another item of evidence illustrating the wretched conditions prevailing during that period. But the discovery of the Osborn shortage brought about a reorganization of the directorate; and after Mr. B. S. Noyes became president, his salary was fixed at $150 per month. This, taking the whole history of the company into consideration, was not, we submit, an "increase" of salary; it was a partial restoration of the original salary which for years and years had been paid to the president of the company; and later on, when a voluntary cut was made in all of the salaries, this salary was itself reduced to $125.00 per month.

The history of the secretary's salary shows a decrease rather than an increase; as pointed out by Mr. Noyes (719), "the salary of the secretary has always been, up to the time that the present secretary was installed, $300 per month; and the salary of the present secretary is $270 per month". It is true that while Mr. Klink was upon the stand as a witness, he stated that he was "prepared to state what a reasonable salary for a bookkeeper to take care of the books in San Francisco would be. I should think about $75 would be about right" (1015). But, as we have already pointed out, the taking care of the books is but a fraction of the secretary's duties (513-4); and the complainant, in paragraph 5, of his supplemental bill (page 231), himself concedes the sum of $150 per month for a competent bookkeeper and accountant,—an amount double Mr. Klink's estimate. So far as Mr. Noyes' own salary is concerned, there never has been any increase thereof; on the contrary, the only modification of that salary has been a reduction thereof through the voluntary cut which is referred to on page 719 and pages 743-5 of the record; indeed, the only salary which was really increased was that of the mine superintendent, Mr. Gleim (564); but that increase kept pace with the increase in his duties and responsibilities; and no claim is made by this complainant that, for him, the sum of $450 per month is either "enormous" or "extravagant" (231). And, indeed, in determining the propriety of these salaries, we take it that the magnitude of the business of the company is a most serious factor.

Cowell v. McMillin, 177 Fed. 25.

In speaking, generally, of these salaries, Mr. Noyes pointed out that

> "our overhead office expenses, such as salary and office expenses, and other expenses of that character, when compared now with the early history of the mine, the cost per ton is very much less. The salaries of our officers are a little more than they were in that early period. Yes, I do regard that as good business management at a time when the results are so very meagre in comparison with previous years, because when a mine meets with unfortunate circumstances, it sometimes requires more skill to operate it. There is very much greater skill being exercised now than there was then. We have to have more skillful men at Shafter to operate that cyanide plant. Mr. Boyd's salary was $200.00 per month, and he received that salary, for, I should say, 15 years. My salary was always $450, except for a couple of years when it was $300. The salary of the president at the present time is $150 per month. The salary of the secretary has always been up to the time that the present secretary was installed $300 per month; and the salary of the present secretary is $270 per month. When silver got low in 1914, we all voluntarily reduced our salaries 16 per cent, conforming to the cut that was made at the mine, and that cut is still prevailing; the salary and wages for men at the mine has been restored as we agreed to when Silver should reach 52; but the San Francisco cut remains." (718-9) * * * "I would like to answer your question a little further about the change of salaries —the salaries here in San Francisco. During the old regime they were $500 and under the present regime they are $770. That is the difference. By the old regime I refer to the pan-amalgamation period from 1885, until probably 1907, when Mr. Boyd was president. My salary was then charged up against Shafter account. From 1901, when I moved here, my salary was charged to the Shafter account; I drew it at Shafter for a long time until I became a director and vice president. Since then I have drawn it through the San Francisco office. Most of my work is done in directing the mine, and the salary is chargeable there at the Shafter work, but it is paid

> through San Francisco. As to how much of my time I was at Shafter, sometimes I go there and stay two and three months, and at other times I stay just a few weeks. As to whether I was there during the past year, I was there during the early part of 1915, I was there quite a while; it is hard for me to remember just how long. My work is in directing and making plans for all of that work." (720-721) * * * "As to the total salaries of the officers in San Francisco per month, the secretary gets $270, the president $150, that is $420. My salary at present is $375 per month; that is, under the cut that we made. The president cut his salary also; he is drawing $125 now. We are paying $395 exactly in San Francisco now. The $770 that I mentioned this morning includes my salary." (734)

In view of these facts, what becomes of the "enormous" and "extravagant" claims of this complainant? This whole subject matter of salaries was commended by the by-laws to the judgment of the directors (511), and this complainant is attempting to impeach their judgment "in respect to matters of business", to paraphrase Justice Harlan's language *(Jesup v. Illinois Central Ry.,* 43 Fed. 483: cited, *Cowell v. McMillin,* 177 Fed. 25, 43). But when we consider the salaries previously paid without comment or criticism by any person,—not excepting complainant, the salaries generally prevailing, the actual beneficial results to this company arising from the efforts of the present management during the period between January, 1913, and December, 1917 (364-5), the duties and responsibilities of the persons whose salaries are now for the first time being attacked, the care and labor bestowed by them upon the company's welfare, activities and records, the views of the experts and the silence of the complainant when

a witness we think it cannot be justly contended that the single increase in the case of Mr. Gleim justifies the general assertions which have been made as to "increases". No objection has ever been made to any of these salaries until the present bill was filed; nor was any objection ever made during any current year, although the salaries were fixed yearly by the board of directors under the authority of the by-laws, and were systematically spread upon the minutes, and were thus open to inspection by any stockholder who retained any interest in the company or its affairs, or exercised but a moderate degree of diligence in that regard. The salaries for 1906 will be found fixed at page 828 of the record; those for 1907, at pages 832-3; those for 1908, the year when the complainant became a stockholder, at page 840; those for 1909 at page 844; the minutes are silent as to those for 1910; those for 1911, at page 850; those for 1912, at page 854; those for 1913 at page 872; and those for 1915 at page 888; but in no one of these years is there a claim or protest of any kind concerning these salaries or any one of them by this complainant, who, although he knew or could have known these facts, suffered these salaries continuously to be paid month after month and year after year. In October, 1913, all of the acts and transactions of the board of directors were ratified by the stockholders (869); and assuming that Mr. William S. Noyes voted at that time to ratify, still he had a perfect right to do so, because he did not cease to be a stockholder because he had become a director *(Green v. Felton,* 84 N. E. (Ind.) 166; *East, etc. Co. v. Merryweather,* 2 Hem. & Miller 254; *Ashurst's Appeal,* 60 Pa. State 290; *Gamble*

v. Queen's County Water Company, 9 L. R. A. 527; *Hodge v. U. S. Steel Corporation,* 60 id. 742).

THE HISTORY OF THE COMPANY UNDER THE PRESENT ADMINISTRATION, NOT ONLY EXHIBITS A MARKED ADVANCE AND BETTERMENT IN THE COMPANY AFFAIRS, BUT ALSO NEGATIVES THE UNFOUNDED CLAIM THAT MR. WILLIAM S. NOYES "CONTROLLED AND DOMINATED" THE CORPORATION AND ITS DIRECTORATE.

There is a very marked contrast between the situation of this company during the period from 1907 to 1912, and its situation during the ensuing five years. Prior to and during 1912, its condition could not have been more deplorable. It was harassed upon all sides. Its treasury had been depleted by the Osborn peculations; the grade of ore obtainable in Section 8 was low; the cost of extraction high; the pan-amalgamation method had outlived its usefulness; silver had depreciated: the big stockholders were keeping off the books; the plan to improve conditions by raising funds through assessment, either met with no response, or with a negative one; as Mills put it in his letter to Boyd (Exhibit G, 665-6), he had "lost confidence" in the enterprise; and this mental attitude infected other stockholders also, for they had no funds to devote to the betterment of the situation. Speaking of these wretched conditions, Mr. B. S. Noyes tells us that,

> "the company last paid a dividend in 1905. It has not been constantly running at a loss since. As to what has become of its receipts, from 1905, down to the end of 1912, the company sometimes ran at a loss and sometimes made a profit; it just kept alive; one month it would do a little

better than another; but about November, 1912, the average ore of the Presidio Mine dropped; that is to say, from that time on, they got no more of this high grade ore until lately, within the last six or eight months, since this suit was commenced, or perhaps at about the same time. I should say, speaking from recollection, three months after, we began to get better average assays, and this year within the last four months, the average assays of ore from Section 8 have greatly improved, while those of Section 5 have declined. I account for that by just the accidents of mining; that is always the case in mines of that sort; the ore goes up and down and it has always done so. The average value of a ton of rock in 1911, and 1912, for example, according to my recollection, was in the neighborhood of $10; that last two or three years, I think our rock has not averaged more than $7 for the three-year period; and if we had not cut the cost of mining from $9.50 to under $6 there would have been no Presidio Mining Company today". (1058-9)

And further, in describing the conditions in December, 1912, he remarks that

"at the close of December, 1912, the cash balance, as shown by the books, was $24,900 and some odd dollars, about one-half of the December yield was in transit and not paid for, which would bring down the actual cash to $16,000 and some odd hundred dollars. Of that, $11,000 was gone—to be exact, $10,689.75, so the actual cash was between five and six thousand dollars, without giving the exact figures. From my examination of the books, and affairs of the company at that time, I ascertained that there were no liquid assets of the company, except the bullion in transit. There is always half a month's income in transit. That sum of money that I spoke of was the only immediate resource that the company had. There was quicksilver which would become an asset, I mean a cash asset, after the mill was closed down, but while the mill was running, of course, it was not available as cash. I am now referring to January 1, 1913; on December 31, 1912, and January 1, 1913, the figures were the same, of course". (908)

In this state of affairs, nothing but the cyanide plant could have saved, or did save, this company; and for that plant, the company must thank the courage, energy and credit of Mr. Noyes. Had he faltered, had he hung back as the others did, the Presidio Mining Company would have inevitably been compelled, to use Boyd's phrase, to "abandon the mine". But the steadfastness of this one man—the man who was "looting" the treasury (amended bill, par. 18, page 76) of the company by joining in a $10,000 guarantee of its debts (725, 864-6), and who was "pillaging" (amended bill, par. 20, page 77) the company by loaning it, shortly after this guarantee, $10,000 of his private funds (679 *ad finem),* not to mention other matters—the loyalty of this one man, without allies, without the slightest co-operation by Overton, or any other stockholder, worked the deliverance of this company, and put it where, with time and careful management, its obligations could be met and its rehabilitation accomplished. That this was not accomplished without untiring zeal goes without saying; that the company commenced its progress toward restoration, burdened by a heavy indebtedness was inevitable; that judicious management was required to eliminate this burden, is but common sense; and yet, in 1915, about the time when Overton commenced this litigation, Mr. William S. Noyes was justified in saying that

> "since the present board of directors went in, in the latter part of January, 1913, they have accomplished this, that they have put in this plant out of the earnings, without calling upon the stockholders for a cent, and they have built up a surplus, as I have stated, of about $22,000 in mine supplies on hand, and they got the mine where it is

> making money. In the Annual Report for 1915, there is a tabulation of the supplies that have been acquired by the company. That report shows, as to the amount of supplies on hand, mill supplies and mine supplies $22,000, all told, of four classes—$22,514 in round numbers'' (719-720);

and in August, 1916, just about a year after Overton commenced this litigation, the new eighty thousand dollar plant was paid for, and the company had in cash at San Francisco and Shafter $40,180.91, in bullion, at the Selby Refinery and in transit $14,767.75, and in mining supplies at Shafter $30,627.78, all aggregating $85,576.44 (1057). This litigation was commenced on July 26, 1915, but while it and its injunctions and receivership would naturally suggest to any careful directorate the inexpediency of declaring dividends pending its final determination, yet it did not prevent an increase in the assets of the company; and an examination of that part of the record dealing with the defendants' objection to the receivership (360-416), and particularly pages 364-5, will show that, on January 24, 1918, just before the receiver was appointed, the assets of the company had increased to the sum of $349,286.27. The contrast between this situation and that existing prior to January, 1913, after Mills, the donor of the Overton stock, had ''lost confidence'', is so striking that one is not surprised that the stockholders generally have conspicuously failed to give aid or comfort to Overton; and as already suggested, the only fair inference is that they are not dissatisfied with the present administration. It is indeed startling to realize that, out of all these stockholders, the solitary fault-finder is the man who would ''control the management''; even Martin,

although enshrined as a nominal complainant, can not be shaken from his transcendent taciturnity.

And when we turn to the inquiry whether this complainant is justified in claiming that Mr. Noyes controlled and dominated the administration which has produced such excellent results, we find ourselves confronted with nothing more tangible than repeated asseveration unsupported by proof. Let us assume, however, against the fact, that Mr. Noyes, because the majority stockholder in the company, was in a position to control and dominate it; let us further assume that, having the power, he actually did exercise it; what indeed would be wrong about that? We submit that there is nothing wrong in the conception of corporate control; decision after decision postulates the fact of control in corporations as in many other human institutions; the natural cleavage of sentiment within the corporation, the natural diversity of judgment as to business affairs, develops that control which the logic of circumstances would inevitably create; and it is a recognized canon of corporation law that the majority stockholder must control; and, to adopt the language of the Supreme Court of Washington,

> "one who buys stock in a corporation does so with the knowledge that its affairs must be dominated by a majority of the stockholders".
>
> *Pitcher v. Mining Co.*, 81 Pac. (Wash.) 1047, 1049.

Thus, in *Lucas v. Milliken*, 139 Fed. 816, where the court pointed out that

> "courts have no right to inquire into the motives of such (majority) stockholders, or to interfere with their discretion" (833), and that "stockholders are not required to

> give reasons for a desire for a change of management'' (836),

it was held that where by the law of the state each share of stock of a corporation is given one vote at meetings of stockholders, the general right of the holders of a majority of the stock to control the corporation follows as a legal consequence, and the right of the legal owner of stock to vote the same is a proper right, in which he is entitled to be protected by the courts against the doubtful claim of another to such stock; and ''the law of the state'' regulating corporate matters should be enforced by the federal courts *(Jellenik v. Huron Copper Mining Company,* 177 U. S. 1).

But a majority stockholder does not occupy a trust relation towards minority stockholders, if he does not actually control the affairs of the corporation to their prejudice *(Rothchild v. Memphis Ry.,* 113 Fed. 476); and hence, even if one were to assume for argumentative purposes that Mr. Noyes ''controlled'' this company in the sense of domination, still the history of the company establishes that such control was exercised, not to the prejudice of the company, but for its benefit and in its best interests; this appears from the attitude revealed in the letter to Mrs. Willis, dated January 23, 1913, long *ante litem motam;* it appears in the significant contrast between the overdraft of January, 1913, and the surplus of December, 1917; and it appears in the independent judgment of the disinterested expert appointed and commended by the learned judge below, which judgment was, *inter alia,* this:

> ''The system by which the bullion apportionment is figured as between Section 8 and Section 5 is not accurate.

Under the existing conditions, however, it is as nearly so as can be made. In this connection, we submit the following conclusions and comments based upon observations of existing conditions and from information elicited at the property:

"That the sampling is carried out in a systematic and practical manner and conforms to the terms of the contract.

"That the tonnage estimates from No. 5 are being kept in the usual mine fashion, where no weighing apparatus exists.

"The sampling for both mines is done in the same manner and method, and the adjustments made to both properties according to the mine assay percentage. Over a long period the law of averages should tend to equalize results.

"To change these methods for the purpose of obtaining more accurate results of assays, weights and reconciling, it would be necessary to adopt either of the following plans:

"1. To maintain an engineering and sampling force at a cost of $5,000 to $6,000 per year and increase the cost of mining by reason of separate handling.

"2. The building of an automatic sampling and weighing plant at an approximate cost of $25,000.

"We have formed the conclusion that the installation of a cyanide plant by the Presidio Mining Company about January 1, 1913, was advisable. Naturally, we are basing that conclusion upon the results shown by subsequent years.

"The question is asked: 'Could the company have survived without it?' By reference to Schedule 2, it will be observed that for the fiscal years 1911 and 1912, the company had been making a considerable profit, aggregating $32,000 for the two years. During the two years, the average yield was $9.95 and $10.97, respectively, per ton of ore. This yield per ton fell off very materially in the years 1913 to 1915, as shown by answer to No. 18. Subsequent events proved the wisdom of the installation, having effected a reduction in cost as set forth by Schedule 2, but it is possible the company might have survived for a

time at least, even without the installation of a cyanide plant.

"The available resources of the company during the period November, 1912, to February, 1913, are set forth in Schedule 15. It is manifest that the Company had not sufficient funds with which to erect a cyanide plant and tramway, but would have had to resort to borrowing. In fact, a loan of $15,000 was authorized January 25, 1913, for the purpose of remodeling the milling plant.

"The available resources of the company in November, 1912, to February, 1913, are shown by Schedule 15. The company could not have purchased Section 5 for $24,000 cash, and it would not have been prudent to do so unless the company had the benefit of full information regarding its value.

"Assuming that the company could not avail itself of the opportunity to acquire the property now known as Section 5, the contract of November 19, 1913, was fair enough. Should its operation have proven unprofitable, it could have been terminated on thirty days' notice. We are of the opinion that the reduction of cost of mining of $1.00 was hardly fair in the circumstances. We are also under the impression that the undertaking by the company to pay $45,000 for securing the lease, was neither judicious nor equitable.

"Furthermore, we cannot fully approve the segregation of profits on the basis of a stope assay. We think a flat payment of some kind, so much per ton, or so much per foot, would be less open to objections.

"Although the payment of $45,000 appears to us as excessive, the arrangement has, on the whole, resulted in a benefit to the company. There has been a steady reduction in average yield per ton from Section 8, at which yield it would have been impossible to continue operations for any great length of time, and the mixture of high grade ore from Section 5 has been essential and necessary.

"The terms of the contract of November 19, 1913, between William S. Noyes and the Presidio Mining Company, have, in our opinion been fairly carried out.

"The books of the Presidio Mining Company at the present time are being properly kept and transactions cor-

rectly recorded. This was not wholly true of the San Francisco office during the incumbency of Mr. Osborn. The company prepares elaborate tables, showing the details of its mining and milling operations. These details are sufficiently clear for the information of all concerned. We might possibly add thereto a more extended form of annual report showing the financial results for each year.

"No separate records are kept as to mining and milling ore from Sections 8 and 5, although separate mine assay records are kept for each section.

"The methods used for estimating tonnage are in accord with mining practice at small mines. The sampling is done in a systematic and practical manner and conforms to the terms of the contract. The assaying apparatus is good and the assaying is conducted in a regular, competent and systematic manner.

"Our observations upon the general environment in which the mining operations are conducted by the Presidio Mining Company at Shafter, Texas, may be summarized as follows:

"Shafter is situated 45 miles southwest from Marfa, the railroad station on the G. H. and S. A. Ry. It is a lonesome, uninviting spot. The nearest place in Texas having a name is Presidio, some 22 miles further southwest. The Mexican border at Ruy Dosa is 18 miles distant.

"The road from Marfa to Shafter is poor and rough and very little work appears to be done towards its upkeep.

"The Town of Marfa is a small burg, having but one street with a few business houses; it offers no market for the purchase of materials and supplies and but few purchases are made at that point, lumber being the principal item. Some purchases are made at the local stores at Shafter and these are said to be supplied on the basis of cost. These conditions compel purchases of materials and supplies from the larger supply houses at El Paso and Eastern points:

"The conditions are such as to compel the company to do its own hauling of supplies from the railroad or to make suitable contracts with the local teaming outfits for hauling. The latter plan appears to be the more satis-

factory, both from an investment and from an operating standpoint; as the company, by contract arrangement, pays only for services rendered.

"The average freighting is about 130 tons per month at $8 per ton, or 17¾ cents per ton mile. The White Motor Car Company would not guarantee to meet this figure by the installation of their trucks. The contractor attends to road upkeep and no expense accrues to the company for such repairs; and the present service appears to be satisfactory.

"If the company should undertake to do the hauling, it would mean considerable investment in equipment and stables, and would necessitate creating a new department, besides taking up much time of the superintendent or one of his assistants who can better devote such time to the mining operations. It is also very doubtful if such department could be operated at any less cost than is now charged by the contractor.

"The mining operations appear to be conducted in thorough fashion and there is every evidence of loyalty and good feeling between the superintendent and his assistants and workmen. The labor is chiefly Mexican and the conditions necessitate the services of special guards for general protection and safety of life and property.

"The mine is one of the principal industrial institutions of the county and is made the prey of political aggressors, labor agitators and land jumpers.

"The company's records have been laid out carefully, and the blank forms for reports show the results intelligibly. Costs are kept in minute detail, in fact more so than is commonly found at small properties. Some changes can be made looking toward a decrease in the amount of labor entailed by the present method.

"The company could advantageously employ a bookkeeper, as thus the superintendent, surveyor and assayer would be relieved of clerical work. The present plan is carried out with a view to low proportion of overhead expense."

The reiteration by this complainant, *usque ad nauseam*, that Mr. Noyes dominated and controlled the

Presidio Mining Company is met by vigorous denials by the defendants; and this asserted control, being part of the complainant's case, one of the essential foundations of his complaint, the burden rests upon him to establish this control, not by remote assumption heaped upon remote assumption *(Ross v. U. S.,* 92 U. S. 281; *First National Bank v. Stewart,* 114 id. 224; *Vernon v. U. S.,* 146 Fed. 125), but by concrete facts, speaking clearly to the point. The depressing conditions that surrounded the company, its depleted treasury, the installation of the cyanide plant, the discovery of the Osborn defalcation, the acquisition of Section 5 by Mr. Noyes, the lease of January 29, 1913, the resolution of February 15, 1913, the final contract of November 19, 1913,—all these things happened in 1913; and therefore the only "control" by Mr. Noyes that would be at all material—assuming any control whatever—would be control during 1913, while this history was in the making. But if we assume that, during 1913, Mr. Noyes was in control of this company, whence did he derive that control? If, in discussions concerning company affairs, his professional training and experience, and his long years of association with this company, gave to his suggestions a weight which would not attach to the suggestions, for example, of a farmer attempting to deal with a mining situation as exceptional as this, will it be claimed that this was "control"? If his advice upon matters of interest was respected, are those who respect the advice "controlled" by the adviser? Is there no distinction between the "control" mentioned in the books, and the intelligent acceptance of suggestions coming from a competent and experienced man? Is there

no difference between "control" and that natural cleavage of sentiment so common in corporate administration? As the courts employ this term "control", there is carried to the mind the sense of command, domination, authoritative rule; the mind gathers the sense of sinister sway, of mastery, upon the one side, and subjection and dependence, upon the other; but so far as our researches authorize us to make the statement, no court has said that a rational appreciation of right reason in business affairs can justly be ranged under the conception of "control". It is contrary to all experience to assume that all influence is undue; on the contrary, much influence that is exerted in human affairs is entirely legitimate; and it is not enough that it should be assumed that Mr. Noyes, though not a majority stockholder, possessed that legitimate influence which would attach to his long experience with the mine and knowledge of its necessities, but in super-addition to this, it must be established that he actually made a fraudulent use of that influence *(Russell v. Gas Co.,* 39 Atl. (Pa.) 21, 23-4); and in this cause, it is affirmatively shown, and shown without contradiction, that none of the board of directors of the Presidio Mining Company had, directly or indirectly, any interest whatever in the contract between the company and Mr. Noyes regarding Section 5 (724; 918-9). It will, therefore, not serve complainant's purpose to say, for example, that Mrs. Willis or Miss Doherty had confidence in the judgment of Mr. Noyes in mining matters, because that state of mind upon her part is entirely consistent with the absence of all "control" by him; she could very well and very properly attach great weight to his judgment in these

matters without being at all "controlled" by him. To paraphrase the language of Judge Hanford at *nisi prius* in *Cowell v. McMillin,* 177 Fed. 25, one may say, dealing with the example just referred to, that Mrs. Willis, or Miss Doherty, was impressed with the belief that Mr. Noyes was the right man to control the business of the corporation, and that he would conduct it successfully; his intelligence, strength and devotion of time and thought to the business and constant anxiety for its success, inspired her with confidence; in their meetings she expressed confidence and approval of his management; he did not have to deceive her or bargain with her in order to secure her assent to his designs; and, reposing confidence in him, she voluntarily deferred to his judgment in many of the important transactions, but in others she did not defer to him. And when this cause reached this court, language was used with reference to the board of directors which may be paraphrastically applied to Mrs. Willis or Miss Doherty in the example just referred to; and so paraphrasing, it may be said that she was interested in the success of Mr. Noyes' efforts, but such interest was not incompatible or necessarily in conflict with her interest in the success of the corporation, which presumably was sufficient to prevent her from sacrificing its welfare, or from corruptly wasting its funds. It nowhere appears that Miss Doherty owed her position on the board of directors to Mr. Noyes, but even though it were established that she did, this would by no means authorize the inference that she would be or was unfaithful to her trust or to the general interests of the corporation whose powers she participated in exercising. It does

not appear that either she or any other director acted otherwise than in the utmost good faith; nor does it appear that in any one instance, save and except the lease of January 25, 1913, Mr. Noyes ever urged or requested any one of these directors to vote in any particular way upon any particular proposition; and even if we were to concede, which we do not by any means concede, that these directors owed their positions as members of the board to Mr. Noyes, still that would not be a concession that Mr. Noyes "controlled" or "dominated" this corporation.

In *Cowell v. McMillin,* supra, this court said, speaking of the board of directors, that:

> "It is insisted, however, that the directors were dummies when they voted for the renewals, because they were elected by the vote of McMillin, the holder of the majority of the shares of stock. This must be considered in connection with all other evidence. In the sense that they owed their positions as members of the board to McMillin, complainant is correct; but, in the sense that they were mere creatures, willing or obligated to do McMillin's bidding, and to aid him in executing fraudulent designs, or knowingly to do any act beyond the law, or that was unfair or oppressive, or against the defendant company's interest, the contention is without merit."
>
> *Cowell v. McMillin,* 177 Fed. 25, 42-3.

But, certainly, Mr. Noyes did not derive this asserted "control" from his ownership of the majority of the stock; because the plain fact is that, during 1913, Mr. Noyes was not a majority stockholder. At the annual stockholders meeting of 1913, he answered the roll call with 30,000 shares (868) out of a total capitalization of the 150,000 shares, and out of a total of 97,923½ shares represented at that meeting; and these 30,000 shares

represented the entirety of his holdings throughout that year. But even though he were a majority stockholder, something more than that fact would be required to justify the assertion that he "controlled", or "dominated" the corporation, because, as has been repeatedly held, the ownership of a majority of the shares, not only does not authorize any presumption of fraud, but it does not authorize any inference that the directors are under the control of the owner of the majority of the shares *(Porter v. Pittsburg Steel Company,* 120 U. S. 649, 670; *Cowell v. McMillin,* 177 Fed. 25, 42-3; *Fox v. Mining Company,* 5 Cal. Unrep. Cas. 996-7; *Hodson v. Duluth, etc.,* 49 N. W. (Minn.) 197; *Mack v. De Bardeleben Co.,* 9 L. R. A. 650; *Dunfy v. Travelers Newspaper Co.,* 16 N. E. (Mass.) 246; *Wolf v. Penn. Ry.,* 45 Atl. (Pa.) 936; *Louisville Ry. v. Neil,* 29 So. (Ala.) 865; *Virginia Passenger Co. v. Fisher,* 51 S. E. (Virg.) 198; *Law v. Fuller,* 66 Atl. (Pa.) 764; *O'Conner v. Virginia Passenger Co.,* 76 N. E. (N. Y.) 1082).

The record makes it clear that Mr. Noyes' suggestions were not always followed. At times, his suggestions were followed: Boyd, for example, was content to follow them in making that recommendation in 1907, as to the installation of the cyanide plant, which was so enthusiastically welcomed by Mills that he actually gave his stock to Overton after inquiring as to his personal liability for corporate obligations; in other instances, also, Mr. Noyes' recommendations were followed; and why should they not have been? But in many prominent instances, he was quite unable to "control" or "dominate"; he failed in his first suggestion of the cyanide

plant—he could not "control" the stockholders into its installation; he failed again, in 1912, to "control" the stockholders into the cyanide venture; he failed to "control" them into assessments; and he failed to "control" them into the purchase of Section 5. Does this condition of things exhibit that sinister sway which the courts have in mind when they speak of "control" or "domination"? And which of these suggestions was an evil one? Which of them was a step in the "looting" of this company, or an instrumentality for "pillaging"? During January, 1913, Mr. Noyes forwarded the fifty cent lease of January 29, 1913, from Texas for adoption; Gardiner and Herger themselves make no criticism of this lease as being the product of "control" or "domination"; it was Gardiner himself who moved its adoption (452); but neither of them makes any claim or would be listened to if he did, that he was "controlled" in his action in reference to that lease by anybody. And so, with the resolution of February 15, 1913; there is not an atom of evidence to show that this resolution was the product of any "domination" by Mr. Noyes; there is not an atom of evidence to show that he even requested its adoption. It does, however, appear, and appear without any contradiction, that the

> "bonus resolution of February 15th was drawn by Mr. McLeod, an attorney in the Mills Building. My brother overlooked it; I think it was at the suggestion of the Board members. I had told them that I would like to draw more money under that verbal understanding than I was, that I ought to have one-half of the net; that as I could not make the contract individually,—that is, I could not lease Section 5 to them until I could dissolve the corporation,—there would have to be some means devised. I put that in the hands of counsel and that was their product.

I believe that February 15, 1913, is the date when this resolution was put through by the board of directors'' (759);

and this sum of $45,000

''was as close an estimate, it was an estimate of what the half of the net would probably amount to during the few succeeding months that it was intended to be in force''. (711 *ad finem*)

And not only are these statements of Mr. Noyes uncontradicted, but they are corroborated and confirmed by the testimony of Miss Doherty, who tells us:

''I remember being present at a meeting of the board of directors of the Presidio Mining Company held on February 15, 1913, all of the board of directors were present; that was the first meeting that I had been to, and that resolution, it is called the compensation or bonus resolution, was drawn up. This meeting of February 15th was the first meeting that I attended. The subject was brought up in regard to paying Mr. William S. Noyes $45,000, to be paid to him in different amounts and at different times. I remember that the first amount was about $11,000, and later on, at later dates, different amounts should be paid that I do not remember; but this $11,000, I remember, because that was the money that was going back in to the Presidio Mining Company. Whether it was at the meeting, or Mrs. Willis' room, I cannot just remember which, that $45,000, was to be paid to Mr. Noyes as a temporary agreement, a temporary arrangement, which would enable him to get this $11,000, for the time being, as Mrs. Willis and I understood it.'' (815-6)

And it further appears that she is wholly unable to say that Mr. William S. Noyes ever actually requested her to propose this resolution:

''Q. And when you attended this meeting of February 15, 1913, at which this bonus resolution was proposed, do you know whether or not this resolution was ready to be submitted when you came in to the meeting?

"A. Well, I have looked that up since, because I did not remember exactly. I was asked in the other case whether that was drawn up, and since then I have inquired and looked in the books and the minutes, and found that it had been prepared and that I proposed it, but that it had been previously prepared. I do not positively know who prepared that resolution, but I should judge Mr. Noyes; I do not know which of the two Mr. Noyes had to do with it. So far as I was concerned, it was all ready to be proposed to the meeting of the directors, and was presented by me. I did not draw it, I proposed it, and it was handed to me to propose at the meeting; I do not recollect who gave it to me—either Mr. Osborn or Mr. Noyes." (818)

And Mr. William S. Noyes is further corroborated by the statement of Mr. B. S. Noyes, who tells us:

"Q. I will direct your attention, Mr. Noyes, to the meeting of the Board of Directors, February 15th, 1913, at which meeting there was a resolution passed authorizing a payment for services rendered to William S. Noyes of the sum of $45,000, $11,000 immediately, and other sums thereafter. I will ask you whether you can tell us the circumstances and facts leading up to the passage of that resolution?

"A. There had been a discussion between William S. Noyes, Mr. Osborn, Mrs. Willis, Miss Doherty and myself, stockholders of the company, as to the putting in of a cyanide plant, whether it could be done or not, and what disposition would be made of Section 5, which Mr. William S. Noyes had bought. Mr. Noyes stated that the company could have Section 5 at cost then or thereafter, and it was informally decided prior to the date of that meeting that the company could not take it, and the suggestion had been made and assented to by all parties that as long as Mr. Noyes carried it, the company would work the ore and settle with him on a basis of one-half of the net. At that time, now coming to February 15th, the company had been in possession, and the terms provided for in that resolution of February 15th, were a sort of a guess at what one-half of the net would amount to during

the period covered by the dates given in that resolution (908-9);

and that Mr. B. S. Noyes was never even requested by Mr. William S. Noyes to propose this resolution, further appears from his statement on cross-examination that

> "I helped draw this resolution of February 15, 1913, and submitted it to my brother; both Mr. McLeod and myself had a hand in drawing that resolution; whether or not it was submitted to my brother, I do not recollect—probably it was." (911)

And so, likewise, with the contract of November 19, 1913, this was the agreement which finally adjusted the relations of the parties; no proof is made of any single concrete fact exhibiting either "control" or "domination" by Mr. Noyes over its adoption. In speaking of the circumstances relevant to this contract, Mr. William S. Noyes says:

> "I had several conferences with both these ladies and one with Mr. Osborn. I told them that there was ore in there we could pull the company out with, notwithstanding the bad situation. We had all of these obligations that were assumed or agreed to be assumed, and it was too late to back out. I was out in round numbers $25,000 of my money put into the Silver Hill Mine, Section 5; I had obtained credit for the company at that time of about $44,000 I think it was; and it was almost too heavy a load for me to carry alone; that the company could take the mine any time they were able to off my hands at its cost, or if I had got to stand under all of this, I thought it was only fair that I should have some compensation for it. Mrs. Willis said she thought so, too, and Miss Doherty joined in that, and I had a talk with Mr. Osborn and he agreed to the same thing; so we agreed between us if I furnished a lease to pay me one-half of the net, and that would be a fair division; so I agreed to carry on the business on that basis. I talked to Mr. Peat in regard to that same proposition and my brother

who in February was a director, and Miss Doherty, who became a director on January 31st, I believe—I only know that from the minutes. At the time of this transaction, I and Miss Doherty and my brother had just become directors; I was in Texas when I was elected a director; I came up about ten days afterwards; I was in Texas in January and returned here in February." (691-2)

Miss Doherty's statement in this connection is as follows:

"As to the meeting of the board of directors held on November 19, 1913, that was the day I remember on which this last contract was drawn up, or proposed rather—passed upon.

"Q. Do you remember any discusion that took place in regard to the contract that was authorized on that day, between the Presidio Mining Company and William S. Noyes?

"A. Well, that all money that had been paid to Mr. Noyes previously would be deemed to have been paid him under this contract, which was an equal one-half of the division of the net profits." (816)

And Mr. B. S. Noyes tells us that:

"Subsequent to February 15th, Mr. W. S. Noyes had gotten in the rest of the stock of the Silver Hill Mill and Mining Company, and had caused it to be dissolved. and a deed had been made to him vesting the title in him. That is all that occurs to my mind as preliminary to that lease of November 19th—whatever the date is. Mr. Noyes was then the legal owner of the property, in possession of it, and entered into a lease as lessor at that time. I am familiar with the terms of that lease, and also familiar with what is known here as form 15." (909-910)

And when we look back over this history of the company during 1913, and pass in review the suggestions made by Mr. Noyes, one cannot avoid inquiring what, if anything, was wrong with any of these suggestions

that they should have been resisted? They were all intended for the betterment of the company; they have all worked out beneficially for the company; the Klink Bean report concedes this; and what better course for the welfare of the company than that pursued, could this directorate have adopted, or has this complainant suggested?

There is a passage at the end of the cross-examination of Miss Doherty (818-9) which, because of its use of the word "control", may detain us for a moment. The use of the word "control" in this passage was not an original or spontaneous act on the part of Miss Doherty, but it was an original and spontaneous act on the part of the learned judge of the court below; he suggested the word "control", and she in a qualified and limited way, fell in with the use of the term by him. It will, moreover, be observed that the subject matter of this passage from the testimony of Miss Doherty was the "voting trust" and how it came about that the stock of Mrs. Willis and Miss Doherty was put into that voting trust; and it was with this subject matter that the entire passage was concerned. But the voting trust was entered into long after any of the occurrences complained of in the bill and enumerated at the end of paragraph 12 thereof, pages 47-8; it is not made, and as we have seen could not have been made, a specific ground for complaint; and it was not entered into until October 1, 1914 (507),—long after the making of the history with which we are concerned in this cause. Moreover, Miss Doherty advises us that "this voting trust was proposed by Mr. B. S. Noyes" (819); and when the court

inquired as to what was suggested as to the purpose or desirability of it, she replied that "as well as we understood, it was to give Mr. Noyes the majority". The court then interjected the question "the control?"; and she replied, "Yes, the control of the stock, I believe." Not only, therefore, are her answers limited to her understanding or belief, not only are they restricted to "the control of the stock", but there is no suggestion here that the object or purpose of that voting trust was to give control and domination of the corporation, not to B. S. Noyes, the man that Miss Doherty was speaking of, but to William S. Noyes, the man that she was not speaking of, at a point of time when the history of this company with which we are concerned had already been made. As we have heretofore suggested, the control which would be material in this action would be control and domination during 1913, and not on and after October 1, 1914, nearly an entire year after the final agreement of November 19, 1913, had been made and had gone into operation. We submit that there is nothing in this passage from Miss Doherty's testimony when it is properly read and analyzed in the light of the history of this company, which shows or even remotely points to any control and domination by William S. Noyes of this corporation.

THE RATIFICATION OF OCTOBER 6, 1913, ESTOPS THIS COMPLAINANT.

The stockholders' meeting of October 6, 1913, ratified and approved all of the acts, transactions and business

of the directors, as set forth in the records of the company up to that date (483); this ratification included directly, *inter alia,* the lease of January 29, 1913, and the resolution of February 15, 1913; and indirectly approved and acquiesced in the acquisition by Mr. Noyes of Section 5. When the roll was called 97,923½ shares responded, and of these shares, Mr. Noyes held 30,000 only (483),—not a majority of the shares, not one-third of the shares. And that Mr. Noyes was entitled to be present and to vote at this meeting, there can be no question; he did not cease to be a stockholder because he had become a director; this would be true even though we were to assume that he was a majority stockholder; and this would be true, also, even though we were to assume that he was in anyway "interested". Upon this subject matter we have already referred to the authorities, and need not repeat that reference here. The general rules as to ratification are so well understood, that they need not be enlarged upon here; and we have heretofore already discussed the absence of any obligation upon the part of the corporation to give to stockholders, whether resident or non-resident, any other, further, different or additional notice or notices of such meetings than that which the law requires.

THIS COMPLAINANT'S CLAIMS ARE WHOLLY BARRED BY LACHES.

Even if we indulge the hypothesis that in 1912 any such fraud as that charged by this complainant was committed, still the pleadings disclose, and the evidence

establishes that such fraud, whatever its nature, has long ago become stale and wholly barred by laches. The professed object of this complainant is to repair the fraud which he asserts was committed, although we believe his real object to be to "control the management" if we are to attach any importance to his written declarations; his claim, however, is based and bottomed upon this alleged fraud; it has its *fons et origo* therein; it depends for its validity upon the existence of that asserted fraud; and his claim is, taking the date most favorable to the hypothesis of this complainant that this asserted fraud was committed in the winter of 1912-13.

But the record in this cause is silent as the tomb concerning any active identification of Martin or any other minority stockholder with the affairs of the company; even Mills, as far back as 1908, had "lost confidence" (666), in the company, and had given away his stock to Overton and others, not one of whom, barring Overton only in later times, ever thereafter exhibited the remotest trace of interest in the company that their donor had "lost confidence" in; and as to the protagonist here, he himself tells us,

> "as to when I first became actively identified in any way with the affairs of the Presidio Mining Company, well, I became a stockholder in 1908. I think I have been very actively connected with its affairs since July, 1915" (579)

And this record further shows that the present litigation was not commenced until July 26, 1915 (31). Consequently, this complainant had no rights as a stockholder prior to 1908; whatever rights he acquired by force of Mills' donation, accrued in 1908; and he was

therefore entitled to the rights and remedies of a stockholder as far back as 1908; and if between 1908 and July 26, 1915, he were, as such stockholder, in any way injured, or prejudiced in any of his rights, it was his plain duty and clear obligation not to sleep upon those rights or to acquiesce in their violation, but promptly resort to, and actively pursue, his appropriate remedy with all that good faith and diligence which, from time immemorial, have been honored of and required by equity. Persons of average intelligence and of ordinary business understanding, as one may *pro hac vice* take this complainant to be, do not permit valuable properties in which they really claim an interest to be "looted" and "pillaged" by others in disregard of their interests, without remonstrance in tangible shape; but never once, from 1908 to July 26, 1915, has this complainant so much as crooked a finger to remedy any professed invasion of any alleged right of his; and it is only now, at this late date, that he brings before this court of diligence a bill that is utterly barren of any explanation as to why, if his claim were grounded in good faith, he has not acted long ago. No attempt, as we shall see, is even made at any explanation, even though we assume that there could possibly be any reasonable explanation for the silence and inaction characteristic of the period between December, 1912, and July, 1915, in view of facts which were known, or which should have been known, to this complainant, when his conduct is judged by the common and ordinary tests which are applied to determine the motives that prompt human conduct. From September, 1908, when Overton

became a stockholder, until March, 1915, when he "came to San Francisco to visit the Exposition" (580), his unconcern, indifference and disregard for the affairs of the company that the donor of his stock had "lost confidence" in, were unqualified and complete; there is not to be found a syllable of proof that, although in receipt of the consecutive annual reports that were issued to each stockholder (597), he ever made a pertinent inquiry, ever asked a question, ever deputized an investigator, ever wrote a letter, ever sent a telegram, concerning any of the company's affairs, or betrayed even the most microscopic attention thereto or regard therefor; so perfect and complete was his disregard that the thought of diligent inquiry, whether personally or through agents, never touched his consciousness; for him, the Presidio Mining Company and its affairs, during all this period, had the tenuity of the shadow of a shade; and so completely had all that concerned the company been obliterated from the family apprehension —even from its memory—that "we had forgotten just what stock our family owned and we wanted to see" (635). And this, too, be it observed, notwithstanding receipt of the Annual Report of October 6, 1913 (complainant's Exhibit 17) which informed him, in plain terms, that

> "early in 1913, Section 5, adjoining the Presidio Mine, was put on the market for sale. This company being unable to buy it, having exhausted its credit on the new installations aforementioned, it was purchased by the writer (Mr. William S. Noyes), and an arrangement made whereby this company will work it on terms of a division of the net and perhaps will *purchase* the same later on. Late developments in Section 5 indicate that it will be a source of large revenue." (629)

And if this were not enough to direct his attention to Section 5, it would still remain true that a two-cent stamp, or a dollar telegram would, if that course had been diligently pursued, have brought any additional information which he might have required; but against his inert lack of diligent activity, even the Gods themselves would have fought unvictorious. It is not enough to assert in broad, general terms that a discovery was not sooner made; it must appear that it could not have been made by the exercise of reasonable diligence; and all that reasonable diligence would have disclosed, this complainant is presumed to have known, the means of knowledge in such cases being the equivalent of the knowledge which would have been procured. If there were any fraud, the duty is upon this complainant to show diligence upon his part to detect it; and also, if he made any discovery, when and how it was made, and why it was not made sooner; and it is not sufficient to make general averments upon these topics, but the facts from which that conclusion follows must themselves be specifically pleaded. This we take to be the law everywhere, both in the federal and in the state courts; the federal authorities will hereafter be more fully referred to; and that this is the law in the state of the domicile of this corporation, the following authorities will abundantly attest:

Hecht v. Slaney, 72 Cal. 363;
Moore v. Boyd, 74 id. 167;
Lataillade v. Orena, 91 id. 565;
Bills v. Silver King Mining Company, 106 id. 9;
Prewett v. Dyer, 107 id. 154;

Robertson v. Burrill, 110 id. 568;
Lady Washington Co. v. Wood, 113 id. 482;
Leigh v. McClelland, 120 id. 147;
Truett v. Onderdonk, 120 id. 581;
Archer v. Freeman, 124 id. 528;
Simpson v. Dalziel, 135 id. 599;
McMurray v. Bodwell, 16 Cal. App. 574;
Lillis v. Silver Creek Co., 21 id. 234;
Davis v. Hibernia S. & L. Society, 21 id. 444.

If he had not, after receipt of the Annual Report of 1913, perpetuated, for nearly two years additional, the same undiligent neglect that marked the period from 1908 to 1913, if he had examined the books and records of the company, if he had deputed someone to do this for him *(Vassault v. Austin,* 32 Cal. 597, 607-8), if he had followed up the information given him by the report of October, 1913, he would have learned every detail of the relevant history; and since the means of knowledge are equivalent to knowledge, since no judicial distinction is made between negligent ignorance and knowledge, since for nearly two years after the receipt of the report of 1913, this advised and informed complainant continued silent, the question naturally presents itself as to whether a court of equity, which exacts promptness and diligence, will give any heed to this stale and belated claim. That these annual reports, and particularly the annual report for 1913, were an effective instrumentality for conveying knowledge to stockholders, is recognized by Mr. Justice Harlan in *Jesup v. Illinois Central Ry.,* 43 Fed. 483, 501—an authority approved in *Cowell v. McMillin,* 177 Fed. 25. In that

case, the learned justice was much impressed by the fact that annual reports had been issued to the stockholders and that those reports advised the stockholders of the lease which was involved in that case. The learned justice took the ground that if the stockholders were ignorant of the terms of the lease, it was because they were guilty of the grossest negligence in not making inquiry upon the subject. He points out that the annual report in that case disclosed the situation, that the report went to the stockholders and that, taking all the evidence, together, the court must proceed upon the ground that means of knowledge, plainly within reach of stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge, and that the fact of the lease, as well as its terms, were fully known to each stockholder. We think this case furnishes a ruling authority upon this subject matter of these annual reports; and we may add that from more than one point of view, relevant to the issues in this cause, the decision just referred to can be advantageously examined.

It is, we think, settled law that the defense of laches, making as it does in the interests of peace, is a wholesome one, and much favored in the law *(Halstead v. Grinnan,* 152 U. S. 412, 416; *Naddo v. Bardon,* 51 Fed. 493, Brewer, J.; *St. Paul Ry. v. Sage,* 49 id. 315, 326, Shiras, J.; *Thomas v. Sypert,* 33 S. W. (Ark.) 1059). And there is a plain distinction between limitations and laches—so much so that much is barred in equity which is not barred at law: "equity, in the exercise of its inherent power to do justice between parties, will, when

justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the Statute of Limitations" (*Alsop v. Riker,* 155 U. S. 448, 461; *Patterson v. Hewitt,* 195 id. 309; *Sawyer v. Cook,* 188 Mass. 163, 168; *Bailey v. Calfee,* 39 S. E. (W. Virg.) 642, 648; *Redforde v. Clark,* 40 S. E. (Virg.) 630). It is by force of these doctrines that long delay alone, because it authorizes a finding of assent or acquiescence, and because it negatives a *bona fide* belief in the alleged rights now and presently asserted to exist, will bar all claim to relief (*Utermehle v. Normant,* 197 U. S. 40; *De Martin v. Phelan,* 51 Fed. 865; *Reed v. Dingess,* 56 id. 171; *Streight v. Junk,* 59 id. 321; *Kemp v. Nickerson,* 66 id. 682; *Halsey v. Cheney,* 68 id. 763; *Guaranty Trust Co. v. Delta Land Co.,* 104 id. 5; *Jones v. Perkins,* 76 id. 82; *Tetrault v. Fournier,* 72 N. E. (Mass.) 350; *Fennyery v. Ransom,* 170 Mass. 303; *Wiggin v. Swamscot Machine Co.,* 68 N. H. 14; *Shields v. Tarlton,* 37 S. E. (West Virg.) 589; *Sawyer v. Cooke,* 188 Mass. 163, 167-8). And where the delay has been so long that important facts have become obscured, relief will be denied (*Abraham v. Ordway,* 158 U. S. 416; *Hammond v. Hopkins,* 143 id. 224; *Lemoine v. Dunklin,* 51 Fed. 487; *Wood v. Perkins,* 64 id. 817; *Jones v. Perkins,* 76 id. 82; *U. S. v. Stimson,* 125 id. 907, 909-10; *Doane v. Preston,* 183 Mass. 569; *Lutjen v. Lutjen,* 53 Atl. (N. J) 625; *Anderson v. Northrup,* 12 So. (Fla.) 318; *Lockwood v. White,* 65 Vt. 466; *Nelson v. Triplett,* 39 S. E. (Virg.) 150; *Jameson v. Rixey,* 26 id. 861; *Pethtel v. McCullough,* 39 S. E. (W. V.) 199; *Seamore v. Alkire,* 34 id. 953).

The original contention of this complainant sought to impress a resulting trust upon Section 5; this view was afterwards abandoned, and an effort made to claim a constructive trust upon the Section; but whatever may or may not be this complainant's real view as to his own claim, there can be no doubt that the statements contained in the Annual Report of October, 1913, are wholly inconsistent with and antagonistic to any thought of any trust in any form, because they assert individual ownership in Mr. Noyes of Section 5, and thus repudiate any relation of trustee and cestui que trust as between him and the company. Under such circumstances, whatever designation may be sought to be attached to the asserted trust, the ordinary rules as to laches apply, and the same degree of active diligence is required as in cases wherein it is sought to rescind a contract for fraud; and in the present controversy this rule is peculiarly applicable because the gravamen of the complainant's accusation is fraud.

New Orleans v. Warner, 175 U. S. 120, 130;
Alsop v. Riker, 155 id. 460;
Hoyt v. Latham, 143 id. 553;
Riddle v. Whitchill, 135 id. 621;
Speidel v. Henrici, 120 id. 377;
Nash v. Ingalls, 101 Fed. 645, 648-9;
Curtis v. Lakin, 94 id. 251, 253-5;
Swift v. Smith, 79 id. 709, 714-5;
Wood v. Perkins, 57 id. 258; 64 id. 817;
Lemoine v. Dunklin Co., 51 id. 487;
McMonagle v. McGlinn, 85 id. 88;
Anderson v. Northrup, 12 So. (Fla.) 318, 324;

Campbell v. McFadden, 31 S. W. (Texas) 444;
White v. Costigan, 138 Cal. 564;
French v. Woodruff, 25 Colo. 339;
Joy v. Compress Co., 58 S. W. (Tex.) 173;
Stanleys Estate v. Pence, 160 Ind. 636;
Raymond v. Flavel, 27 Ore. 219;
Boyd v. Mutual Fire Association, 94 N. W. (Wis.) 171;
Nougues v. Newlands, 118 Cal. 102;
Scofield v. Wooley, 25 S. E. (Ga.) 769;
McLaflin, v. Jones, 155 Ill. 539;
Blackledge v. Blackledge, 91 N. W. (Iowa) 818;
Willson v. Trust Co., 44 S. W. (Ky.) 121;
Southall v. Southall, 26 id. (Tex.) 150;
Redford v. Clarke, 40 S. E. (Virg.) 630;
Merton v. O'Brien, 117 Wis. 437.

Hence, we believe that no language could well be more appropriate at this juncture than that used by Mr. Justice Swayne in *Grymes v. Saunders,* 93 U. S. 55, where the learned justice remarked:

> "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, *at once* announce his purpose and adhere to it. * * * He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

And the following are some additional instances intended to illustrate the general attitude of the courts upon this subject matter:

Perry v. Pearson, 135 Ill. 240,
3 months delay fatal;
Bailey v. Fox, 78 Cal. 396,
4 months delay fatal;

Hatch v. Lucky Bill Mg. Co., 71 Pac. 865,
10 months delay fatal;
Landreth Co. v. Chevenel, 52 S. W. (Tenn.), 149;
11 months delay fatal;
Rothschild v. Memphis Ry., 113 Fed. 576,
17 months delay fatal;
Green v. Covillaud, 10 Cal. 330,
18 months delay fatal.
Kinney v. Mg. Co., Fed. Cas. 7827,
2 years delay fatal;
Kerr v. Southwick, 120 Fed. 775,
2 years delay fatal;
Chicago Ry. v. Pierce, 64 Fed. 296,
2 years delay fatal;
Land Co. v. Ewing, 65 Fed. 705,
2 years delay fatal;
Beament v. LaDow, 66 Fed. 194,
2 years recognition constitutes ratification;
U. S. Co. v. Atlantic Ry., 34 Ohio St. 450, 463,
2½ years acquiscence fatal; and see this decision approved by Justice Harlan, in
Jesup v. Ill. Cen. Ry. 43 Fed. 483, 500, 501;
and see
Jesup v. Ill. Cent. R. R. approved in *Cowell v. McMillin,* 177 Fed. 25, 39, 43;
Buchler v. Black, 213 Fed. 886; 226 id. 703,
3 years delay fatal;
Richardson v. Walton, 49 Fed. 896,
3 years delay fatal;
Scheftel v. Hayes, 58 Fed. 460,
3 years delay fatal;

Lumley v. Wabash Ry., 71 Fed. 29,
3 years acquiescence fatal;
Evans v. Montgomery, 50 Iowa, 337,
3 years delay fatal;
Woodfolk v. Marley, 40 S. W. Tenn. 480,
3 years delay fatal;
Williams v. Maxwell, 31 S. E. (West Virg.) 913,
3 years delay fatal.

From 1908 to 1913, this complainant had been receiving the annual reports of this company, but he, too, like Mills, had "lost confidence" in the enterprise, if he ever had any; and during all of that time, he made not the slightest effort to become, what he calls "actively connected with its affairs" (579). The question is not an impertinent one as to why during this period of time he did not take an active interest in those affairs, but that question must remain unanswered,—this complainant, the one person who could enlighten us upon that topic, has remained persistently silent. Then came the annual report of 1913, with its disclosure of the financial inability of the company to purchase Section 5, of the extinction of the company's credit upon the new installations, of the purchase of Section 5 by Mr. Noyes, of the arrangement with him for the division of the net, of the possibility that the company might purchase Section 5 later on, and of the hope and expectation that Section 5 would become a source of large revenue; but with all these facts thus promptly brought to the complainant's notice and attention, we find him still pursuing the same policy of apathetic disregard for this company, its fortunes and its affairs, which had characterized his conduct from 1908 to 1913. He did not come to San Fran-

cisco in April, 1915, for the purpose of inquiring into company matters; no such motive inspired his visit to San Francisco at that time; he entertained no such interest in the company or its affairs, which would urge him to make such a visit; and his visit to San Francisco was for the purpose of inspecting the Exposition, and not of inquiring into those company affairs for which he had hitherto shown such complete disregard, and that, too, notwithstanding the disclosures of the annual report of 1913. Going East, again, and passing by way of the company's property in Texas, he notices and commends the excellent equipment of the enterprise, considers it to be a going concern instead of a dead one, ignores the mountain of debt occasioned by that excellent equipment, and becomes touched by an obsession to "control the management" as he expresses it in his confidential letter to Mr. Gleim. Can it be that this solitary individual—for he has no backing from any other stockholder, minority or majority—knowing what he knew from the annual report of 1913, can now, after the foresight, ability and energy of William S. Noyes had done so much to put this company in the way of complete rehabilitation, ignore his previous apathy and seek to absorb the benefits created by another man's exertions? If the hopeful anticipations as to Section 5, so plainly expressed in the annual report of 1913, had not been realized, does anyone suppose for a moment that this complainant would have been aroused into activity? And if, instead of those anticipations being realized the future brought disaster and debt, does any one suppose for an instant that this belated complainant would have come forward to soften that disaster or

to liquidate that debt? We submit that equity can have no sympathy with such a situation as this, and that it calls for the full application of the beneficent doctrine of laches.

But, in addition to the general demand of equity for diligent promptness in cases of this impression, there is in this cause at bar, a special reason for diligence to be found in the character of the property involved in the action; and it may be stated to be the rule that in causes involving mining property, the doctrine of laches is relentlessly enforced. Many authorities may be cited to sustain this proposition, but we think that the views of the Supreme Court will be quite sufficient to illustrate what we mean:

> "It thus appears that the right of action accrued to the appellants in April, 1885, and that this suit was not begun until eight years thereafter,—in 1893. Whether the refusal of Hewitt to make the deed was right or wrong is not material here. There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of the ore in 1890, and that it was through the efforts and perseverance of the defendants, and the aid they received from Fergusson, that they were put in possession of this valuable property. If appellants had expected a share in this property they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to

> nought. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

Patterson v. Hewitt, 195 U. S. 309, 320-321.

And the doctrine for which we are contending is fully recognized by this court. In *Buchler v. Black,* 226 Fed. 703, 707, this court declared that

> "the rule which requires prompt action is held especially applicable to cases in which a sale of mining property is involved";

and followed up that statement by quoting from *Johnston v. Standard Mining Co.,* 148 U. S. 370, the following unmistakable declaration of the law:

> "The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value."

And so in *Hatch v. Lucky Bill Mining Co.,* 71 Pac. (Utah) 865, in holding ten months too long to wait, the Supreme Court said:

> "Where the property involved is of a speculative character, and is constantly changing hands and fluctuating in value, it is incumbent upon a party complaining of fraud or other wrong by which he is deprived of his property to be prompt in instituting proceedings for its recovery. He cannot remain passive, with full knowledge of what

> has been done, and when, through the energy, risk, and expense of others connected with the business or enterprise, the property suddenly becomes valuable, compel its restoration to him. 'It is also settled that the stockholder must take the requisite proceedings to be relieved against the company at once upon his discovery of the truth. Any unreasonable delay, and any act on his part tending to show acquiescence, will debar him of relief'."
>
> *Hatch v. Lucky Bill Min. Co.*, 71 Pac. (Utah) 865, 868.

Why should not these views be applicable here? In 1907, the efforts of Mr. Noyes to redeem this enterprise by the installation of a cyanide plant met with failure through the apathy of stockholders who refused to contribute and who had "lost confidence" in the enterprise; in 1912, the condition of the company was calamitous, but still no help came from the stockholders; it could not install the cyanide plant; it could not purchase Section 5; by reason of the purchase of a new engine, and the making of indispensable repairs at Shafter (670) plus the peculations of Osborn at San Francisco, it had but a few dollars in its treasury, and its credit was nil; out of this Slough of Despond it was dragged by the energy of one unaided man, who set it upon the road to renewed prosperity; he did what this crippled company had neither the intention nor the financial ability to do,—that is to say, pursuant to an antecedent declaration of intention (682-3, 813-4, 817), he purchased Section 5 openly, paid for it with funds obtained upon his own credit, was willing that the company should take it over at cost whenever able to do so, in the interim operated it with the company upon *precisely the same character of contract that this single fault-finder him-*

self uses in the management of his farms (608), and disclosed all the facts in the annual report of 1913; and now, after the company under this arrangement has about cleared off its obligations, has accumulated a surplus, and is on the way to success, this solitary complainant breaks a conscious and informed silence of nearly two years with his accusation of fraud, seeks to strip this company's savior of his just reward, and endeavors to appropriate as much thereof as he can, including the "control of the management", to his own use; why should not the views of the Supreme Court be applicable here, and the doctrine of laches be relentlessly enforced?

Nor is any explanation offered to account for the indifference and unconcern of this complainant from 1908 to 1915. It may be that he sympathized with the "lost confidence" of Mills, but that is no reason why he could not have written at least one letter a year concerning company affairs. In his original bill, he makes no pretense that he even wrote a single letter to a company official concerning company affairs. In his amended bill, we find the same condition of affairs; in his supplemental bill (par. 10. page 235), he alleges the conclusion that complainants have been "kept in ignorance" of the real facts surrounding the management (whatever that may mean), and the further conclusion that complainants were "unable to secure information" prior to this suit (whatever that may mean in view of Overton's investigations at the office; 579, et seq.; 890, et seq.), and the only fact stated is that he "inquired by mail at various times as to the corporation affairs,

but was not informed as to the true condition by the secretary who corresponded with him" (235). These afterthoughts of the complainant are fully met in the answer to this supplemental bill (277-8), and they are wholly unsupported by a vestige of proof—which is not surprising when we pause to realize the gross lack of interest disclosed in the confession that "we had forgotten just what stock our family owned and we wanted to see". It is said by Justice Story that "every fact essential to the plaintiff's title to maintain the bill, and obtain the relief, must be stated in the bill, otherwise, the defect will be fatal" *(Eq. Pleading,* 9th Ed. 257); and before a chancellor will consider the case of one guilty of laches, the latter must, by apt averments in his bill, sustained by proof, explain away the delay, if he can, in prosecuting the claim advanced (*Eyre v. Potter,* 56 U. S. (15 How.) 42; *Badger v. Badger,* 69 id. (2 Wall.) 95; *Wood v. Carpenter,* 101 id. 140; *Wollensak v. Reiher,* 115 id. 102; *Richards v. Mackall,* 124 id. 187; *Boone County v. Burlington Ry.,* 139 id. 684; *Hammond v. Hopkins,* 143 id. 252; *Felix v. Patrick,* 145 id. 331; *Pearsall v. Smith,* 149 id. 237; *Hardt v. Heitweyer,* 152 id. 559; *Potts v. Alexander,* 118 Fed. 885; *McMonagle v. McGlinn,* 85 Fed. 88, 92-3; *Lant v. Manley,* 71 id. 7; *Wetzell v. Minn. Ry. Co.,* 65 id. 23; *Glascott v. Lang,* 2 Phill. Ch. 310; *Hoyt v. Hoyt,* 27 N. J. Eq 399; *Hart v. Stribling,* 21 Fla. 136; *Brainerd v. Arnold,* 27 Conn. 617; *Anderson v. Northrup,* 12 So. (Fla.) 328; *Gibson v. Herriott,* 17 S. W. (Ark.) 589; *Wilcoxon v. Wilcoxon,* 199 Ill. 244; *Richardson v. McConaughey,* 47 S. E. (West Virg.) 287; *Kleinclaus v. Dutard,* 147 Cal. 245).

The amended bill exhibits a most unique and anomalous sensitiveness as to this matter of laches, declaring in advance that "these complainants are not guilty of laches in prosecuting this suit" (71); and the supplemental bill, apparently in a further attempt to forestall the inevitable, undertakes to tell us that

> "these complainants never knew of the manipulations and conduct of the affairs of the Presidio Mining Company, nor of the acquiring of Section 5 under the facts and circumstances it was acquired by Wm. S. Noyes, nor of the peculations of L. Osborn, nor of the salaries paid to the officers, nor of the election of B. S. Noyes to the presidency, nor of the falsity of the records and reports of the corporation, nor of the acts and deeds done and performed as in the amended bill of complaint and herein alleged, for the reason that these complainants reside in the State of Maryland and of Kansas respectively, and have been kept in ignorance by the officers of the company of the real facts surrounding its management" (paragraph 10, pages 234-5).

So far as the allegation goes, that these absentees were "kept" in ignorance of company affairs, we have seen that no duty whatever rested upon the company officers to remove company records from the state of the domicile of the corporation or to ship them off to the foreign states of Maryland or Kansas for inspection by these absentees; and we have further seen that no effort whatever was made by Overton, (Martin being a mere *ignis fatuus)* to obtain any information, no proof being made that he even wrote a single inquiring letter or sent an agent to investigate, or retained sufficient interest to remember "what stock our family owned." But in addition to this, no appeal can be made by this recipient of annual reports since 1907 (597), including

that for 1913 (601), to his alleged non-residence, because it is settled beyond cavil that even the nondiscovery of a fraud by reason of a residence in a remote and secluded region, will not excuse laches.

Broderick's Will, 88 U. S. (21 Wall.) 503.

The principle of this decision has been applied in numerous subsequent cases, some few of which may here be mentioned:

Bower v. Stein, 177 Fed. 678;
Von Horst v. American Hop & Barley Co., id. 976;
Kessler v. Ensley, 123 id. 566;
Naddo v. Bardon, 47 id. 787; 51 id. 496;
Dugan v. O'Donnell, 68 id. 990;
Rudland v. Mastic, 77 id. 690;
Phelps v. Grady, 168 Cal. 73; 79-80;
Townsend v. Eichelberger, 38 N. E. (Ohio) 208;
Merchants National Bank v. Spates, 23 S. E. (West Virg.) 683, 685;
Lafferty v. Lafferty, 26 S. E. (W. V.) 265.

The general tenor of these authorities may be illustrated by *Von Horst v. American Hop and Barley Co.,* supra, which was a bill by a stockholder to enjoin the enforcement of an assessment on his stock by the corporation for the payment of debts, the stockholder alleging that the assessment was made without notice to him and pursuant to a conspiracy to deprive him of his stock. It was held that the bill was insufficient, not only because it failed to allege facts sufficient to show a conspiracy, but also because nothing appeared to indicate that any notice of the intended assessment was

required by any statute or by-law. At the close of the opinion Judge Van Fleet remarked:

> "Nor does the averment of a want of notice to complainant of the purpose to assess the stock add anything of substance to the bill. I know of no obligation independent of one created by specific agreement or by-law requiring notice to either a director or stockholder, absent from the country, of proceedings of a corporation to assess its stock. No such obligation is stated in the bill."

And, in the cause at bar, "no such obligation is stated in the bill". And so for one more illustration of the general trend of these decisions, we may briefly refer to *Bower v. Stein,* supra, which was a proceeding to set aside a foreclosure proceeding for fraud, and in which the complainant endeavored to explain her delay in bringing the suit by the reason, *inter alia,* that the delay was occasioned "by her living in a distant state". In the course of the opinion, Gilbert, C. J. points out that

> "it is no excuse for such delay that the plaintiff is without means or resides in a distant state" (citing many authorities).

And the learned judge closes the opinion in that case by stating that

> "The records were public and at all times accessible to her. Everything which she now complains of was discoverable upon examination thereof. She could then have ascertained all of the facts in regard to the sale in ample time to have redeemed therefrom. The possession of the means of knowledge was equivalent to knowledge itself. Having had the opportunity of knowing, she cannot now avail herself of her failure to acquire actual knowledge of the facts. A much shorter period of inaction than here has in similar cases been held ground for the denial of relief" (citing many authorities).

Attention may be called to a passage in paragraph 13 of the amended bill (53-4). At that place, after referring to sundry meetings of the company and the business done there, it is said that

> "your orators being far distant from the state, knew nothing of the real condition of the company's affairs, and were never notified of the said acts and deeds of the said directors and officers of said company as herein set forth".

But what is there in this record to show that the minority stockholders, "other than your orators" were not all within the State of California, and duly notified of all the acts and deeds referred to? What is there here to show that a single one of them was then "far distant from the State"? What intelligent or rational meaning can be attached to the enigmatic phrase "far distant"? And, so far as these complainants themselves are concerned, what figure can distance cut when we know Martin to be no more than a marionette, and Overton to be so apathetic anyway that "he had even forgotten just what stock our family owned"? And if, in the face of the disclosures of the record, we credit Overton with even the most infinitesimal thrill of interest in the affairs of the company, how could his being "far distant" (whatever that may mean) nullify telegraphs, postal facilities, lawyers, accountants, agents or any other instrumentality that one seriously desirous of acquiring information would naturally utilize? What notification, indeed, was this unconcerned absentee entitled to that he did not receive? The unmistakable fact is that, as we have already hinted, until Overton visited this mine in 1915, he had adopted Mills'

attitude; he had "lost confidence" in the enterprise; he had even "forgotten just what stock our family owned"; but when he saw the growing consequences of Mr. Noyes' ability, foresight and energy, he gave way to that pecuniary motive which is so characteristic of human nature and so often responsible for human controversies; he then forgot that he was "a farmer" and determined to "control the management" of this enterprise, annexing en route the results of Mr. Noyes' efforts; and thus it came about that seven years after he was given his stock by Mills, and about two years after he was fully advised concerning Section 5, he for the first time sets up a wail about fraud and carries his querulous jeremiad into a court. Why should not in a case of this type, involving mining property, the wholesome doctrine of laches be "relentlessly enforced"?

NO FOUNDATION WAS LAID BY THE COMPLAINANT TO JUSTIFY THE INJUNCTIONS COMPLAINED OF.

During the course of the proceedings below, two injunctions were issued by the learned trial judge. The first of these, dated December 30, 1915, was directed against Wm. S. Noyes, and was designed to restrain him from drawing any further sums of money from the company on account of ore taken from Section 5; and to restrain the company from paying Mr. Noyes any moneys on account of that section or ores taken therefrom; and to restrain Mr. Noyes from transferring Section 5, or any interest therein, pending the determination of the suit. The second of these injunctions

dated December 12, 1916, required William S. Noyes, B. S. Noyes and L. Osborn to deposit 59,544⅝ shares of the capital stock of the company with the clerk of the court, and forbade them from transferring those shares or any part thereof. These injunctions are continued in force by the decree appealed from.

Like a receivership, an injunction is a most drastic remedy; and it is among the established principles of equity that whenever an adequate remedy for an asserted grievance can be had either at law or in the final decree, resort cannot be had to this extraordinary remedy—the extraordinary remedy is reserved for extraordinary cases. Hence it is that the courts take the position that injunctions should not be loosely granted *(Willis v. Lauridson,* 161 Cal. 106, 117), and that they are matters not of right, but of judicial discretion *(Lagunitas Water Co. v. Marin County Water Co.,* 163 Cal. 332; *Marre v. Union Oil Co.,* 17 Cal. App. 209); the discretion here referred to, does not, however, mean whim or caprice, but a sound judicial discretion only, to be exercised in conformity with the rules of law *(9 Amer. & Eng. Enc. of Law,* 2nd Ed. 473-4). In view of this general attitude of the courts, it would seem that, in order to justify the extraordinary and drastic remedy here invoked, it should at least appear that the right of the complainant is so clear and unquestioned that "his individual need requires the remedy for which he asks" *(McCabe v. Atchison, etc. Ry.,* 235 U. S. 151, 164), that this caustic remedy is demanded by the imminence of such an irreparable injury as cannot be pecuniarily compensated, and that the applicant is without

any adequate remedy. No injunction should, we think, be granted, unless it appears clearly that its refusal will work irreparable injury; it is not enough to allege generally that an asserted injury will be irreparable, but the very facts themselves must be so stated that the court can see for itself whether the assertion of irreparable injury is well or ill founded *(Ind. Mfg. Co. v. Koehne,* 188 U. S. 681, 690); and no injury is irreparable which is capable of being pecuniarily compensated *(Amer. Mang. Steel Co. v. Alaska Mines Corp.,* 250 Fed. 614, 615). And from these views, it necessarily follows, we submit, that the solvency or insolvency of the person against whom the writ is sought, is a most material matter—his inability to respond to a decree must appear and appear positively, and not upon mere information and belief *(Parker v. Cotton,* 67 U. S. (2 Black.) 552; *Lucas v. Milliken,* 139 Fed. 816; *Doke v. Peek,* 110 A. S. R. 70).

It is, however, impossible to see in the record here that any case has been made which renders necessary any resort to this extraordinary remedy; the asserted right of the applicant is neither clear nor unquestioned; his individual need does not require the mordant remedy that he seeks; no showing of irreparable injury is made; it nowhere appears that any one of the defendants is insolvent or unable to respond to a decree; and it appears that the complainant is barred by laches. Not only in the present instance have we neither irreparable injury nor insolvency,—a circumstance which distinguishes very many authorities, but it affirmatively appears that these defendants are solvent and quite well able to

respond to any righteous decree; and this feature of the case is actually reinforced by the claims of this complainant as to the sums of money which he declares have been received, notably by Mr. Noyes. It is stated in paragraph 18 of the amended bill (page 76), "that your orators and the minority stockholders of said corporation will suffer irreparable injury and damage in addition to that already by them sustained"; this allegation plainly distinguishes between the "damage already sustained", and the "irreparable injury and damage" which is "in addition" thereto; as an allegation of irreparable injury, this bald *pronunciamento,* barren of specific facts, is worthless (*Ind. Mfg. Co. Koehne,* 188 U. S. 689, 690; *22 Cyc.* 929; *DeWitt v. Hayes,* 2 Cal. 463, 469; *Turnpike Co. v. Yuba Co.,* 13 id. 190; *Mechanics, etc. Co. v. Ryall,* 75 id. 601; *Cal. Navigation Co. v. Union Co.,* 122 id. 641); and by what authority Mr. Overton assumes to speak either for Martin or for "the minority stockholders of said corporation", we are at a loss to understand. We have already in describing this litigation referred to the conspicuous absence of Martin and all other "minority stockholders of said corporation", and their failure to sympathize with the private ambition of Overton; nothing appears to show that these people are not able to speak for themselves, if they feel that they have suffered, or are about to suffer, any irreparable injury; it nowhere appears that they make any such claim, or have authorized Overton to make it for them; as the decisions already cited, both federal and state, clearly point out, the only inference to be drawn from their silence is that they do not sympathize with the accusations and purposes of Overton's bill, and

have no fault to find with the present administration of the company affairs; and the fact, we submit, cannot be ignored that this whole litigation is designed to further the private ambition of this solitary complainant to "control the management", and does not represent the views and desires of the stockholders generally. In other words, Overton did not inaugurate, and does not maintain, this litigation with clean hands, and should, therefore, be denied the assistance of a chancellor in the accomplishment of his monopolistic ambition.

But why was any injunction necessary so far as the moneys and the land were concerned? If, for the sake of argument only, we assume this complainant to be entitled to have Mr. Noyes convey Section 5 to the company, and to a money judgment in favor of the company, there would still be no reason, based upon any principle of equity, why this extraordinary writ should issue. So far as the land is concerned no more effective *lis pendens* than this very suit could well be imagined (*Barstow v. Beckett,* 110 Fed. 826, 827-8); and any purchaser *pendente lite* would take subject to the event of the litigation. So far as any money judgment is concerned, its gross amount would be only $63,336.20, which was the amount received by Mr. Noyes on account of Section 5; but from that, as we read the decree, would have to be deducted $24,009.33, paid out by him as a purchase price of Section 5, and also the sum of $1500.60 paid by him for taxes assessed against Section 5, and also the sum of $10,689.75 being the amount of the Osborn shortage together with interest on these various amounts, aggregating a considerable sum, but

which, for the convenience of the illustration of the lack of "need" (*McCabe v. Atchison etc. Ry.*, 235 U. S. 151, 164), for this injunction might even be neglected. In other words, as of January 25, 1918, just prior to the appointment of the receiver, the amount of this money judgment, including all moneys paid Mr. Noyes on account of Section 5, and also the Osborn shortage, principal and interest, would not exceed the sum of $44,798.35. Over against this, however, is the fact that these defendants own 92,4331/2 shares of the capital stock of the company, out of a total capitalization of 150,000 shares; in round numbers, favoring stockholders other than the defendants, 40 per cent of this judgment would be in favor, so to speak, of the stockholders other than defendants, and sixty per cent thereof would be in favor, so to speak, of the defendants themselves; and therefore $17,919.34 would be the amount which the complainant Overton, and all other stockholders (assuming any sympathy between them and him) would be entitled to receive from the defendants. But, laying aside all consideration of Mr. Noyes' private fortune, ignoring the brilliantly successful failure of the complainant to establish his financial inability to respond to a decree, and forgetting that, if complainant's accusations be true, Mr. Noyes' dealings with the company, regardless of any other interests, would have made him a rich man, it is to be observed that the assets of the company as of January, 1918, aggregated $192,249.99; and that, in January, 1918, it being then prudent to declare a dividend of $100,000 the defendant directors offered to pay that sum into court, and to stipulate that their equitable interests as stockholders

therein, amounting to $61,155.60, should stand as a bond to secure the payment of any money judgment that might be recovered (362-3). If it be true that an injunction is improper where no immediate injury is imminent and any tangible injury complained of and established may be remedied in the final decree (see, for example, *Donnelly v. Walsh,* 150 Ill. App. 144), if it be true that

> "the desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks".

(*McCabe v. Atchison, etc. Ry.,* 235 U. S. 161, 164), if these views be sound, where was the "need" for this drastic remedy? What facts has this complainant presented sufficient to show that, under the circumstances of this case, "his individual need requires the remedy for which he asks"?

And we respectfully insist that the second injunction is equally unjustified. By it, the learned court below seeks to impound shares of the capital stock in which neither Overton, nor any other of the absentee minority stockholders, ever had any right, title or interest. The order for this injunction advises us that its underlying theory is that Overton, a stranger to the stock transactions between Osborn and Noyes, can legally undertake to interfere in those transactions and/or their consequences, because of his assumption that Mr. Noyes actually extorted that stock from Osborn; the order points out that the 59,544 5/6 shares dealt with were the shares held by Osborn in December, 1912, but now

standing upon the books of the corporation as enumerated in the order; and since, in our discussion of the Osborn stock episode, we have fully examined these matters, it would seem that no good purpose can be subserved by repeating that discussion here. We shall merely add that we cannot understand how the learned court acquired jurisdiction over Mr. Parcells, or to make orders concerning his property; he was not a director of the company, nor a party to the action, nor did he have his day in court upon any issue involved in the action; and if, upon any conceivable theory, Overton has any *locus standi* to impeach Mr. Parcells' title to his stock, the least he should have done would have been to have brought him in as a party so that he might have had an opportunity to be heard upon Overton's claims (*Hobbs Mfg. Co. v. Gooding,* 176 Fed. 259). This phase of the situation, as concreted in the decree appealed from, has already been referred to in our general statement as to this litigation. The extraordinary feature of this situation is that, since Overton has embarked in the quixotic enterprise of avenging what he regards as other people's wrongs—notwithstanding that they do not consider themselves wronged—he has not undertaken to avenge the "wrongs" done the Silver Hill Mill and Mining Company in its dealings with Mr. Noyes. At page 60, he puts forward certain weird statements concerning the circumstances under which Mr. Noyes acquired the Silver Hill Company's stock, mentioning "information", and the "understanding" of those whom Mr. Noyes dealt with; not only are these statements wholly unsupported by any proof, but no ingenuity can discover in this record any

injury to the company or Overton arising from those dealings; yet, if Overton desired to be logical, he should have tilted at this windmill also,—if he is justified in assuming the role of avenger of the grievance which he alone assumes Osborn to have had against Noyes, why does he not also advise the stockholders of the Silver Hill Company that they, too, have a grievance, and that he is the redresser of grievances par excellence, working altruistically, and with no canny idea to "control the management"?

NO FOUNDATION FOR THE EXISTING EXPENSIVE RECEIVERSHIP WAS LAID BY THE COMPLAINANT.

One would suppose that any reasonable person would have been satisfied that the injunctions issued in this cause, assuming them to have been proper in themselves, would fully protect the rights of this complainant, if those rights were in need of protection. Those injunctions stopped all payments of moneys; they imprisoned the land in question pending the determination of the suit; and they impounded the stock of Mr. Noyes and his brother,—even the stock of strangers to the litigation; but this did not satisfy the complainant, and nothing short of this unnecessary and expensive receivership would do. Like an injunction, this remedy is harsh and drastic; it suspends the corporate functions; it displaces the corporate management, and hands over the enterprise to the keeping of a stranger. Such was and is the language, purpose and effect of the decree complained of upon this appeal; no order of like character could well be more universal in its scope; and un-

der its operation, the normal corporate authorities, already bound hand and foot by injunctions, are ousted from the authority conferred upon them by the great majority of stockholders and the law, and compelled to surrender the internal affairs of their company to strangers. No claim has ever been made, no claim could honestly be made, that any one of these injunctions has in the most trivial particular been violated by any one of these defendants; and when this fact is contrasted with the unnecessary expense of this receivership, with its invasion of the internal affairs of the company and its supersession of the normal corporate management, and when we consider that this removal of the property and affairs of the corporation out of the control of its officers is effected at the request of a single complainant seeking to "control the management", who is not supported in his personal desires by a single other stockholder, whether of the minority or majority; we feel that we have a clear right to complain of this extravagant and wasteful piece of supererogation.

It is remarked by this court that

> "directors who administer the affairs of the corporation must always use the utmost diligence, good faith, and fairness to the minority stockholders, but this duty does not affect the principle that ownership of a majority of the capital stock of a corporation gives to the holders legal power to control the corporation, lay down its policies, make themselves, or those whom they select, its directors or agents, and fix their compensation".
>
> (*Cowell v. McMillin,* 177 Fed. 25, 43, citing *Jessup v. I. C. Ry.,* 43 Fed. 483);

and, in another case, this court rejected the thought that

a stockholder in a corporation has

> "any standing to apply for a receiver to control a corporation or wrest from it its corporate property on the ground that the business of the corporation is managed unwisely or unjustly".
>
> (*Pearce v. Sutherland,* 164 Fed. 609, 613);

and in recognizing the principle that a receivership will not be permitted where an injunction will be sufficiently protective, it was observed by Pardee, Circuit Judge, that

> "I understand the practice in courts of equity, in dealing with cases of this kind at the suit of a stockholder, is never to resort to the extreme remedy of taking the property out of the hands of the members chosen and elected by the stockholders, except as a last resort, and when considered to be absolutely necessary for the preservation of the trust fund * * * the matter of appointing a receiver, then, comes to this: such appointment is not necessary, provided the present directors are in such a position as to satisfy the court that, under the limitations to be imposed by the court preventing them from alienating or encumbering the property, and from paying ing out and disposing of the revenues other than as required in due course of operating the property to carry on the business according to the charter and in the interest of all the stockholders, and enjoining all changes of the status quo in connection with the matters specifically charged in complainant's bill, they can provide for the $15,000 necessary for the sinking fund under the first mortgage, and stay or otherwise provide for the judgment in favor of the Bass Foundry and Machine Works until after the next regular election of directors. If they can so satisfy the court, no receiver will be appointed but an injunction will issue."
>
> *United Elec. Securities Co. v. Louisiana Elec. Light Co.*, 68 Fed. 673, 676, 677.)

Do not the injunctions already issued in the course of the hearing in the instant cause, upon the application

of this complainant, and directed to the matters which he considered should be made the subjects of injunctive relief, fully protect this complainant as to the matters of which he complained, and should they not, therefore, have sufficed for his protection without this additional and expensive invasion of a receivership? Moneys, lands and stock are covered by these injunctions; to adopt the language of Judge Pardee, limitations are imposed by these injunctions which prevent these defendants from alienating or encumbering the property and from paying out and disposing of the revenues; why, then, subject this corporation to this unnecessary receivership?

And that this enterprise was a going concern during all relevant times, there can be no doubt; the whole record shows it; the showing of these defendants in opposition to this receivership makes that fact abundantly clear (360-416); complainant's original bill admits it (par. 15, page 22; paragraph 16, p. 24); and the impression made upon the mind of the complainant when he visited the mine and plant with Mr. Gleim was such that the complainant "expressed great surprise to him at seeing such a splendid equipment because the mine seemed to be a going concern instead of a dead one" (581). Under such circumstances, not overlooking the scope of the injunctions by which those in charge of the enterprise were restrained, and bearing in mind that not one of the persons connected with the enterprise was shown to be insolvent, or to be doing or contemplating any act injurious to the company or any of its stockholders, we submit that the decree establishing

this receivership should be in this respect, as well as in others, reversed by this court.

Gutterson et al. v. Lebanon I. & S. Co., 151 Fed. 72 and cases cited.

Elliott v. Superior Court, 168 Cal. 727.

Fischer v. Superior Court, 110 Cal. 129.

We have just said that the complainant failed to establish that any of the persons connected with this enterprise was insolvent; and this condition of fact furnishes such a well settled answer to a demand for a receivership that we shall cite but little authority to the point. Thus, in an equity suit wherein the appointment of a receivership was sought as part of the relief, it was observed by the Circuit Court of Appeals for the Fifth Circuit, that:

> "There being no averment in the bill that the defendant Joseph is insolvent, it does not appear that there would be any equity in collecting the decree. If the decree, when rendered, would be collectible there is no necessity for seizing property for its satisfaction in advance of its rendition. The appointment of a receiver is an extraordinary remedy, and cannot be properly resorted to unless a necessity for it is shown."

Joseph Dry Goods Co. v. Hecht, 120 Fed. 760, 765.

And that the views of the majority stockholders will be recognized, see:

Tolman v. Ubero Plantation Co., 142 Fed. 270;

so, in a well considered Nebraska case, it was held that a receiver will not readily be appointed in a stockholders' suit for mismanagement of corporate affairs, where neither the corporation nor the corporate officers

are insolvent, and the corporation is a going concern profitably conducted; and also that where it is within the ordinary powers of a court of equity to grant sufficient relief to a complaining minority stockholder who alleges mismanagement by corporate officers, a receiver will not be appointed (*Miller v. Kitchen,* 103 N. W. 297). In connection with this decision, it is to be observed that in the present cause no complaint has ever been made of or concerning the purely mining activities of the Presidio Mining Company; it has never been urged, for example, that as a mining engineer, Mr. Noyes was incompetent, or that the mine superintendent, Mr. Gleim, did not understand his business, or that the mine itself was inefficiently managed; on the contrary, both in the complainant's pleadings and in his testimony, we find ample commendation of the mine *qua* mine. This condition of the record brings to mind a corresponding feature of *Miller v. Kitchen.* There,

> "no complaint is made but that the highest skill and most profitable management has been exercised, so far as the hotel business itself is concerned. The property has been kept in good repair, the business has been profitable, and there is no complaint that the good will is suffering, or that the property of the corporation used in the business itself is being lost or destroyed." (103 N. W. 298)

Substantially the same feature appears in the present cause; and since in *Miller v. Kitchen,* this feature of insolvency was considered, the following extract from *High on Receivers,* quoted with approval in the opinion of the court, may advantageously be quoted here:

> "The general principles in regard to the appointment of receivers of corporations have been clearly and succinctly stated by Mr. High as follows: 'And courts of

> equity will not ordinarily, by virtue of their general equitable jurisdiction or of their visitatorial powers over corporate bodies, sequestrate the effects of the corporation, or take the management of its affairs from the hands of its own officers and intrust it to the control of a receiver of the court, upon the application either of creditors or shareholders. And while equity may properly compel officers of corporations to account for any breach of trust in their official capacity, yet, in the absence of statutes extending its jurisdiction, it will usually decline to assume control over the management of the affairs of a corporation upon a bill filed by a stockholder alleging fraud, mismanagement, and collusion on the part of the corporate authorities, since such interference would necessarily result in the dissolution of the corporation, and the court would thus accomplish indirectly what it has no power to do directly. The remedial power exercised by courts of equity in such cases ordinarily extends no further than the granting of an injunction against any special misconduct on the part of the corporate officers, and, although the facts shown may be sufficient foundation for such an injunction, the court will not enlarge its jurisdiction by taking the affairs of the corporation out of the management of its own officers and placing them in the hands of a receiver."

See, also, *Brenton v. Peck,* 87 S. W. (Tex.) 898.

The distinction between fraud and corporate mismanagement is well recognized. So far as corporate mismanagement is concerned, a very strong case, far beyond anything shown here, must be established in order to justify a receivership; and this, because of the extreme and frequently expressed reluctance, even repugnance, of the courts to interfere with the internal affairs of the corporation; and the general rule is that misconduct, unwise management or lack of prosperity is not enough to call for a receiver, and that irreparable injury at least must be established (*Cowell v. McMillin,* 177 Fed.

25; *Pearce v. Sutherland,* 164 Fed. 609, 613; *Taylor v. Decatur Co.,* 112 id. 449, 452; *Ala. etc. Co. v. Shackelford,* 34 So. (Ala.) 833, 834-5; *Stokes v. Nickerbocker Investment Co.,* 61 Atl. (N. J.) 736, 738; *Von Schlemmer v. Keystone, etc. Co.,* 46 So. (La.) 991; *American, etc. Co. v. Schuler,* 79 S. W. (Tex.) 370, 375; *Hayes v. Jasper Land Co.,* 41 So. (Ala.) 909; *Secord v. Wheeler Mg. Co.,* 102 Pac. (Wash.) 654, 655-6).

Hayes v. Jasper Land Co., supra, may be briefly referred to. The bill in that case was filed by a minority stockholder against the corporation and its president accusing the president, as is usual in this class of cases, of all sorts of wrong doing, including the calling of irregular meetings, the presentation of unfounded claims, the taking from the treasury excessive sums in the way of salaries and expenses, absolute control of the company and its money and assets and the purpose to continue to appropriate the assets under various devices making it difficult, if not impossible, to trace and recover the same. It was not averred that either the corporation or its president was insolvent, but it was alleged that the board of directors managed and controlled the company's business and affairs under the domination and control of the president and that through his mismanagement and fraud the company would ultimately be destroyed. The answer of the president in that case denied the various charges of fraud, and the answer of the land company adopted the answer of the president. In affirming the judgment of the chancellor below refusing to appoint a receiver, the Supreme Court said:

> "The general rule is well established that the power to appoint a receiver and sequestrate property will be

exercised with great caution, and a resort to this remedy can only be had in extreme cases, and where it appears that without it the plaintiff will sustain irreparable loss. Alderson on Receivers, Sec. 49. Another principle of law, which seems to be as well settled, is that, to justify the appointment of a receiver in limine before the decree upon the merits of the bill, two grounds must appear: First, a reasonable probability that the complainant will succeed ultimately in obtaining the general relief sought; second, imminent danger to the property, the subject of the suit. Again, a receiver should not be appointed at any stage of the proceedings if any other remedy will afford adequate protection to the party applying.

"It has been ruled by this court that the fact that the directors and officers of a corporation are fraudulently misappropriating the assets of the company will not alone of itself constitute ground for the appointment of a receiver. If they are solvent, they can be brought to an accounting, which will afford complete relief and is therefore an adequate remedy."

To sum up the situation in a sentence, minority stockholders are not entitled to a receiver except in a most extreme case; and we submit that where defendants are restrained by injunctions which impound moneys, land and stock, where no one connected with the enterprise is shown to be unable to respond to a decree, where no claim is made that any person connected with the enterprise is doing or contemplating doing any act or thing injurious to the company or any of its stockholders, where the asserted fraud is claimed to have occurred five years before anyone dreamed of requesting a receiver, and where any alleged injurious consequences of the pretended fraud are fully covered by existing injunctions and can be met and provided for in the final decree,—where all these features occur in a cause, we submit that it cannot be said to be that

extreme case in which a single minority stockholder may displace the regular corporate authorities, suspend the corporate functions and hand over the corporate property and affairs to the keeping of strangers.

The case of the Worth Manufacturing Company may here be referred to as illustrating the views which we are urging. The case was decided by the Circuit Court of Appeals for the Fourth Circuit. The original bill was filed by minority stockholders of a private corporation; it alleged no oppression of the minority, disregard of their interests, or allegations of fraud against the majority in their conduct of the affairs of the company. It was made the chief ground of complaint that the Engelworth Mills was purchased at a price beyond its value, by the contrivance of two directors; but this purchase was sanctioned by the unanimous vote of the stockholders. Because of this purchase and the alleged insolvency of the corporation, the minority desired the corporation dissolved and its affairs wound up, and to this end prayed a receivership. In that case, as in this, no creditor was made a party. In that case, as in this, there was no allegation that any debts were due and unpaid. In that case, as in this, there was no charge that any creditor was pressing for his claim. Upon the filing of the bill, and without notice to any of the respondents, the receivers were appointed; and the propriety of this action was the principal question determined by the Circuit Court of Appeals. That court pointed out that, so far as the original bill was concerned,

> "it is quite apparent that no pressing necessity existed which required the property of the Worth Manufacturing

> Company to be wrested from its possession, without notice, at the instance of a small number of stockholders, alleging, in substance, an improper purchase of a small mill property more than a year before the filing of the bill, and alleging that the welfare of the stockholders required that the management of the corporation should be taken away from those selected by the great majority of its stockholders, and alleging, although a going concern, and not pressed by any creditor, that it was insolvent, or in imminent danger of insolvency, and should be wound up. The granting of the injunction and appointment of receivers without notice, was, in the first instance, irregular and improvident."

The complainants, however, filed an amended bill. This bill went upon the hypothesis that the corporation was actually insolvent or in imminent danger of insolvency; that gross mismanagement, inefficiency and inattention on the part of the managing officers resulted in a loss of over $30,000 to the stockholders during the year 1901, and that the managing officers of the company had perpetrated a fraud upon the complainants and other stockholders by reason of the purchase of the Engelworth Mills. The result was that the judgment of the lower court was reversed, and the cause remanded to the Circuit Court, with instructions to dismiss the bill. In the course of the opinion, the appellate court remarked that:

> "The only instances in which the insolvency of a corporation is ground for the appointment of a receiver are when such insolvency has been brought about by the fraud or gross mismanagement of the officers or directors. It must be kept in mind that this is a private corporation, a business enterprise; that it is governed by the votes of its stockholders; that they are the judges, and the best judges, as to the conduct of their own enterprise, and that when the majority adopt in good faith a line

> of policy which, in their opinion, will best subserve the interests of the enterprise, the minority must yield. Nor does this record disclose such gross mismanagement, inefficiency, and inattention in the conduct of this corporation as will justify taking the property out of its hands and committing it to the management of the court. The first consideration is that nine-tenths of the stockholders and all of the directors approve of the mode in which the corporation has been conducted; that nearly every creditor of the corporation has in writing expressed the desire that the corporation should conduct its business; that up to the last year the corporation has been prosperous, and has made money; that the last year was disastrous, largely, if not entirely, owing to the general depression of business all over the country. Business enterprises must have their vicissitudes. Universal experience shows that a course of uninterrupted prosperity is of the most exceptional character. If one unfortunate year is sufficient to put a corporation into the hands of a receiver, few corporations could escape."
>
> *Worth Mfg. Co. v. Bingham,* 116 Fed. 790, 791.

The appellate court then observed that the most grave charge was that there was fraud in the purchase of the Engelworth Mills. The court pointed out that "there was no presumption of fraud", referred to the stockholders approval of the purchase of these mills, pointed out that the fact that the purchase was made from a company in which the majority of directors in the purchasing company are directors in the selling company, does not make the sale invalid, citing *inter alia Barr v. Plate Glass Co.,* 57 Fed. 87, pointed out that a stockholder is not forbidden to vote upon the propriety of such a sale because interested in it, and declared that "we see no evidence of concealment or underhand dealing". The court then went on to summarize the situation by saying:

> "We then have this condition of affairs. In a private corporation all the directors and a large majority of stockholders, in the exercise of their judgment, purchase a piece of property, believing it to be for the best interest of the enterprise. A minority object. Does this authorize the dissolution of the corporation, the cessation of all of its business, the taking away of all of its property out of the hands of the corporation and putting it in the hands of receivers? The question answers itself."

And then after holding that this was not a case for the appointment of a receiver, and that the stockholders themselves are the best judges of what is for their interest, the court directed the discharge of the receivers. The court then took up the question as to whether the bill should be dismissed, and in reaching the conclusion that it should be dismissed, the court pointed out, and the language is not inapplicable to the present predicament, that

> "there is no averment that the complainants have ever applied to the managing officers to alter any policy they are pursuing, or that the minority have attempted to call a stockholders' meeting to consider the affairs of the company, or that they have done anything to impress their views upon the majority except to precipitate financial difficulties for the corporation by filing this discrediting application for its winding up. Insolvency, without fraud, waste, or extravagance is not ground for appointing receivers to wind up a corporation. * * * The present case appears to be an effort to get the court to assume the management of a corporation at the instance of a minority of stockholders, without the cooperation of a single creditor, and against the protest of the great majority of the stockholders. Looking to all the facts and surrounding circumstances, we do not find that the bill presents a case for equitable relief."

Worth Mfg. Co. v. Bingham, supra.

And here it may be added that one of the points of difference between the case last referred to and the cause at bar is that in the present cause the court is not applied to by the "minority stockholders" at all; on the contrary, as we have already pointed out, the present is a "one man case", and the solitary individual who has originated and is prosecuting this litigation is the individual who writes confidentially to Mr. Gleim concerning the time when he may "control the management"; and were we to paraphrase the language just quoted from the Circuit Court of Appeals in its applicability to the present situation, we should say,

> "the present case appears to be an effort to get the court to assume the management of the business of a corporation, at the instance of a single minority stockholder, without the co-operation of a single other stockholder, whether minority or majority, without the co-operation of a single creditor, and against the protest of the great majority of the stockholders. Looking to all the facts and surrounding circumstances, we do not find that the bill presents a case for equitable relief."

This case of *Worth Mfg. Co. v. Bingham* was followed and approved in a later case. There, the bill was brought against the Alleghany Window Glass Company, a Delaware corporation, and Robert W. Hilton, who was its president and one of its directors. The bill alleged, to express it briefly, that Hilton was the owner and holder of over sixty per cent of the capital stock, that the complainant was a minority stockholder, and that Hilton, in violation of his fiduciary relation to the company, was guilty of divers and sundry fraudulent acts resulting in the depreciation of the value of the capital stock; and the bill alleged that if Hilton, and the direct-

ors associated with him, were continued in the management of the company, that fact would be a menace to the best interests of the minority stockholders, and would impair and eventually destroy the value of their stock and of the property and good will of the company. The bill prayed for the appointment of a receiver to take charge of the property and to manage it to the best interests of all of the stockholders, and for sundry other relief, including an injunction. The learned judge who decided the cause first considered the prayer for the receiver. He points out that the bill seeks the appointment of a receiver *for an indefinite period and without limitation as to time,* and that what the complainant desires is that the court shall substitute a receiver for the board of directors to exercise, *until otherwise ordered,* the corporate franchises on the ground of alleged mismanagement and disregard of fiduciary duty detrimental to the interests of the company and its stockholders and threatening disaster to them in the near future. The court points out that to justify such a course as this, "a strong and clear case must be established", that the board of directors are charged with the management of the company and that

> "when the law making power has declared that the business affairs of a corporation, created and organized under that power shall be directed by its Board, it ill becomes courts created for the administration of the law, unless under special and exigent circumstances, to declare that its business and affairs shall not be directed by such Board."

The learned judge then considers briefly those "special and exigent circumstances" including among them impossibility for the corporation to answer any of the

ends of its creation, and also what he describes as fraudulent, willful or reckless mismanagement of its business, such as would result in destruction of its business or cause great and unnecessary loss to its creditors and stockholders. He points out that no

> "mere differences of opinion among stockholders or directors as to business policy or methods pursued, or to be pursued by the corporation, can of themselves constitute a legitimate ground on which to vest in a receiver control and management of the corporate property and franchises."

He then refers to some authorities, following which he declares that the vital question is not whether irregularities have occurred but whether there has been fraud, wilfullness or recklessness on the part of the directors and officers in the management of the company's property and affairs—such flagrant disregard of their official duty as to show their unfitness to control the business and to establish the probability of serious financial disaster and ruin of the corporate enterprise should they further continue in charge. He then disposes of certain acts and proceedings which, had they been present in the cause at bar, would have evoked loud and long-continued lamentation by this complainant, and declares that

> "to wrest the possession and control of the property and affairs of the glass company from its board of management and substitute a receiver for such trivial considerations as the above, would betray a lack of all proper sense of proportion."

After disposing of the complaint that the secretary of the company refused the complainant access to its books, the court observes that

> "the bill abounds in epithets of fraud, but with respect to fraud adjectives cannot supply the place of facts. To sustain a charge of fraud the facts constituting it must be definitely set forth in the pleadings and strictly proved."

He then criticises the averments of the bill, many of which are similar to those in the bill at bar, shows a pronounced dislike for vituperative allegations and closes this branch of the opinion with the following very suggestive language:

> "Directors may be elected by the holder of a majority of the stock of a corporation and yet be free agents and honest men. The fact that they have been so elected does not necessarily or usually convert them into mere puppets to further any fraudulent or wrongful scheme that may be proposed by the majority stock owner. The presumption of honest and fair dealing is not destroyed. In fact, there is evidence here that on one or more occasions the views of the other directors prevail against those of Hilton. And, further, the evidence does not show that on any occasion the Board was induced by Hilton against the honest judgment of a majority of his co-directors to take or omit action touching the conduct or affairs of the company."

In the cause at bar, Mr. Noyes was not even the "holder of a majority of the stock of the corporation". In the cause at bar, it nowhere appears that the directors were elected by the holder of a majority of the stock of the corporation. In the cause at bar, it nowhere appears that the directors were converted into mere puppets to further any fraudulent scheme proposed by any majority stockholder or by Mr. Noyes, or that Mr. Noyes ever proposed any fraudulent scheme. In the cause at bar there is not a syllable of proof to destroy the presumption of honest and fair dealing which has so firm a

foundation in the law. In the cause at bar there is evidence that, upon several occasions, the views of Mr. William S. Noyes did not prevail as against those of the leading stockholders; and in several conspicuous instances, as already pointed out, he failed, and failed completely, to win over those leading stockholders to his views. And in the cause at bar there is not a syllable of evidence to show that any single act of the board of directors of the Presidio Mining Company, save and except perhaps the approval of the lease of January 25, 1913, was produced or brought about by any request made by William S. Noyes. So far as the lease of January 25, 1913, is concerned, the proof shows that when it was presented to the board of directors, Mr. Noyes was in Texas; the proof shows that it was presented to the board by Osborn; and the proof shows that its adoption was moved by the director Gardiner, who, we take it, would be one of the last persons that this complainant would claim to have been influenced by any sinister sway or control exerted by Wililam S. Noyes.

The court then goes on to say that the glass company was a solvent going concern, and that under such circumstances necessity does not require, or propriety permit, the appointment of a receiver, and follows this up by the following pertinent suggestions:

> "Further, while injunctive relief might well be granted against any illegal, ultra vires, wrongful or fraudulent acts, calculated to inflict injury and loss upon the company, threatened by Hilton or any other of its officers or directors, this court cannot undertake to forfeit Hilton's majority stock ownership or, under the circumstances, deprive him, even though temporarily, of the right legitimately to exercise the control incident to such

ownership. If the power possessed by Hilton through his ownership of a majority of the stock to control the election of directors and thus indirectly to influence the policy and conduct of the company were of itself a sufficient ground for the appointment of a receiver the receivership logically should be continued until Hilton's death or the alienation of his majority ownership, whichever event should first occur, and for and during that uncertain period this court would be engaged wholly unnecessarily in carrying on the private business of manufacturing window glass, and that, too, with probably no assistance from the persons on the present board who have had extensive and practical experience in the conduct of the business and affairs of the company. The creation and indefinite continuance of a receivership would most seriously impair the reputation and standing of the company and in all likelihood produce a condition requiring the winding up of its affairs, the distribution of its assets, and practically, though not theoretically or technically, the termination of the corporate enterprise. Such a result should be avoided even on the assumption that the contract of purchase between the glass company and the Ormsby company was unwise, improvident and improper."

The court then refers to *Worth Mfg. Co. v. Bingham,* supra, discusses certain admissions by the complainant, and concludes that

"on the whole, it is quite clear that no case for the appointment of a receiver has been established, and that the prayer in that behalf, and that for injunctive relief, must be denied."

The remainder of this opinion discusses fully the matters complained of as fraudulent, finds against the alleged fraud, points out that

"even if it be assumed that Hilton was guilty of fraud of such character and extent as to warrant the setting aside of the contract of purchase on a proper bill brought by the glass company, it by no means follows that it

> should be set aside at the application of a minority stockholder'';

and adds to this the suggestion that

> ''the ownership of only a minority of the minority of stockholders is behind the objection taken in the bill to the contract. The other minority stockholders are entitled to receive from this court consideration equal to that which should be accorded to the complainant.''

And this last suggestion of the learned judge reminds us that in the cause at bar the ownership of something considerably less than ''a minority of the minority of stockholders'', is behind the objections taken in the bill; in the cause at bar, we have not even the minority of the minority; we have but a solitary stockholder urging this litigation without the slightest co-operation from any other stockholder, whether minority or majority; and to paraphrase the language of the learned judge, the other minority stockholders, and also the majority stockholders, are entitled to receive from the court full consideration, but we believe and earnestly urge upon this court, that upon the whole case made in the present litigation, no consideration should be accorded to this complainant *(Carson v. Alleghany Window Glass Co.,* 189 Fed. 791).

As remarked by the court of chancery of New Jersey:

> ''That upon this branch of the case insolvency is a jurisdictional requirement is so well settled in this state as to avoid the necessity of citation in support of it. A careful examination of the papers fails to convince me that the internal dissensions between the officers of this company and its stockholders have reached any such point as to require the intervention of this court. Manifestly the present board of directors are supported by a large

> majority of the stockholders. Out of a par value of $267,000 only $60,000 approximately have intervened and asked to be permitted to be made parties complainant with the original complainant, and the presumption is that the residue, amounting to $200,000, are in sympathy with the management of the board of directors. This important fact cannot be overlooked in determining the question whether the dissensions in the company have reached the point demanding interference. Such a contest as this, provoked by a minority of stockholders, would constantly arise if the court should say that the protest of every dissatisfied stockholder was a basis for such internal dissensions as to warrant a receivership."
>
> *Stokes v. Nickerbocker Invest. Co.* 61 Atl. 736, 738.

We hope to be forgiven the length of this brief when we say that we feel very earnestly in this case; and while we understand that the declarations of counsel concerning the justice of their cause are usually received with hesitation, yet there are occasions when counsel are right; and we believe this to be one of those occasions. This is a contest which involves more than one issue, and a finding of fraud would mean the dishonor of a man now no longer young, who has devoted practically a lifetime to the service of this corporation, and against whose good name and conduct no complaint has hitherto during all these years been made. He asks no more than an impartial investigation of the accusation made against him; he wishes his good name cleared; in this, he is joined by the other defendants; and for this, we are here at the foot of a tribunal which has written its name with honor in the jurisprudence of the country. In this court is our hope; for its assistance we have labored; and asking only justice according to law,

we feel secure in this presence, where passion and prejudice are unknown and where the transitory storms of the hour are powerless to provoke an echo.

Dated, San Francisco,
February 17, 1919.

Respectfully submitted,

R. T. Harding,

Henry E. Monroe,

Solicitors for Appellants.

J. J. Dunne,

Of Counsel.

No. 3253

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,

Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this Complaint,

Appellees.

BRIEF FOR APPELLEES.

WM. F. ROSE,
Solicitor for Appellees.

CHARLES CLYDE SPICER,
Of Counsel.

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Appellees.

BRIEF FOR APPELLEES.

Appellants devote the first thirty-six pages of their brief to a "General Statement of the Litigation." We controvert said statement because of its prolixity, and its argumentative and complex character. We present herewith our own statements in concise form, to permit this court to have the main facts as to time, place, circumstances and parties before it. In our argument we shall analyze the evidence and proceedings fully.

Statement of the Case.

The present appeals grow out of a stockholders' suit charging fraud and other wrongful acts, brought by two minority stockholders on behalf of themselves and any others who might desire to unite, against the corporation and the individual defendants holding its majority stock and controlling the corporation adversely to minority stockholders. Complainants seek to recover for the corporation:

Section 5;

Moneys paid on Section 5 account;

Moneys stolen from the corporation by L. Osborn;

Return of excessive salaries;

Any and all illegal profits made from or through company business, directly or indirectly, by any or all of the individual defendants;

For an accounting and judgment according to the equities thereupon appearing;

For injunctive relief and a receivership.

The suit was begun July 26, 1915, partially tried in March, 1916, examination of company books then ordered by the trial court, report of auditors filed, trial concluded and case argued August 29, 1916; briefs thereafter filed, and case submitted for decision December 2, 1916; oral opinion of the court rendered December 3, 1917; motion to reopen case, with answer, filed, argued, and denied; interlocutory decree filed February 16, 1918; ob-

jections to appointment of receiver, with replies, heard and objections overruled; receiver appointed, the order appointing receiver being filed February 20, 1918; receiver took over company business in San Francisco, February 23, 1918, and after ancillary proceedings in Texas, the company business, property, and Section 5 in that state on March 5, 1918.

The interlocutory decree adjudges in complainants' favor:

That the individual defendants were guilty of conspiracy and fraud against the company and its minority stockholders;

That Wm. S. Noyes illegally obtained benefits for himself while in a fiduciary relation to the company;

That Osborn, the secretary, had embezzled the company funds;

That various resolutions and transactions had and entered into by the individual defendants during the period of their majority control were fraudulent, illegal and void;

That Wm. S. Noyes wrongfully acquired Section 5; that he is a trustee therefor and the Presidio Mining Company the rightful owner, subject to the payment to Wm. S. Noyes, of its purchase price;

That corporation manipulations were handled by Wm. S. Noyes as the dominant control, acquiesced in by the other individual defendants; that thereby the company was defrauded by said

majority control, to its detriment and to the detriment of the minority stockholders.

That Wm. S. Noyes on getting the control of Section 5 then drew a lease between himself, in effect, and the corporation, for which he had the "bonus resolution" drawn giving him $45,000 for obtaining said lease, $11,000 payable forthwith; that this sum was used by him under the guise of a loan to Osborn for money stolen by Osborn from the company amounting to $10,689.75, taking Osborn's promissory note secured by his stock. The decree requires the deposit of the Osborn note with the clerk of the court, as well as all the stock originally held by Osborn.

An accounting was ordered and the matter referred to the standing Master in Chancery.

From the interlocutory decree and order appointing receiver appeals were taken; no supersedeas bond has been filed, and the receiver has conducted the mining operations since his appointment.

By stipulation, both appeals are to be heard on the one transcript.

Statement of Facts.*

* Record references to each of these facts appear in the argument.

The Presidio Mining Company is a California Corporation incorporated in 1883, now capitalized at $150,000.00, with 150,000 shares, par value $1.00 each. About two-thirds of its capital stock is held

by defendants. It has its home office in San Francisco. It owns and operates a lead-silver mine comprising Section 8, in Shafter, Presidio County, Texas.

Wm. S. Noyes and L. Osborn have been connected with the said company since its organization. Wm. S. Noyes continuously since organization, and until the receiver took charge, had sole charge of mining operations at Shafter, residing there up to 1901. Since 1901 he has resided in Oakland. L. Osborn had, as secretary of the company, full charge of the San Francisco office for a number of years up to 1913; from January, 1913 to September 23, 1915 he retained his position as secretary, but did not have sole charge of the office of the company. John W. F. Peat was president from 1907 to 1913, then assistant secretary and later secretary.

On December 1, 1912, Wm. S. Noyes owned only 1382 shares of stock; L. Osborn was the largest stockholder and had 57,213-1/3 shares in his own name and held 2331½ shares as trustee; L. M. Doherty had standing in her name as the agent of India Scott Willis 36,956⅔ shares. B. S. Noyes first became a stockholder in the early part of 1913. J. W. F. Peat had 10 shares.

In November, 1912, E. M. Gleim, in charge of the mine under Wm. S. Noyes, wrote to Noyes that the adjoining Section 5 was for sale. Wm. S. Noyes at once went to Ashland, Oregon, to see Benton Bowers and arranged for a loan of $10,000 to

assist in the purchase of Section 5. He returned the early part of December, 1912. On December 12, 1912, 28,607 shares of the Osborn stock were transferred to Noyes. December 16, 1912 Wm. S. Noyes went to Texas. He met his assistant Gleim at the Marfa railroad station, 45 miles from the mine. Wm. S. Noyes immediately arranged to borrow $10,000 from the Marfa National Bank. He and Gleim then obtained options on all but four shares of the Silver Hill Mill & Mining Company stock, a Texas corporation then owning Section 5, Harry Young, half owner, optioned his stock to Noyes for $10,000. They then went to the mine the latter part of December, 1912. Both Noyes and Gleim examined Section 5, with which Wm. S. Noyes was already familiar, he having formerly operated said section. They estimated the new ore body which had been recently opened up by the Lewissohn Brothers (in Stope 13) to be worth from $100,000 to $400,000. The ore was sampled in the office of the Presidio Mining Company, samples being taken and work done by company operatives under direction of Noyes and Gleim. All expenses in connection with the matter were paid by Presidio Mining Company. Wm. S. Noyes borrowed the $10,000 he had previously arranged for from the Marfa National Bank on his promissory note, depositing with said bank as collateral security the Osborn stock secured by him in December, 1912. The Presidio Mining Company's bank account was transferred during this period from the

San Antonio National Bank to said Marfa National Bank. Said Noyes likewise borrowed $10,000 from Benton Bowers, pursuant to the prior arrangement. Benton Bowers was then and had been for many years the contractor hauling freight and wood for Presidio Mining Company.

All said borrowed moneys were deposited in the Marfa National Bank to the credit of Wm. S. Noyes, against which he drew his checks in payment for stock of the Silver Hill Mill & Mining Company, then owner of Section 5. He paid Harry Young $5000 in cash and gave him a promissory note for $5000. All Noyes' and Gleim's travel and other expenses were paid by Presidio Mining Company during these transactions.

In the meantime, arrangements had been made with John W. Kniffin to design and install a cyanide plant in place of the pan amalgamation mill. He arrived December 24, 1912, and finished his plans the early part of January, 1913.

January 23, 1913, Wm. S. Noyes wrote the Willis letter. By January 25, 1913 he had secured practically all of the Silver Hill stock. On said day he made a lease between the Silver Hill Mill & Mining Company, executed by directors he had installed (688), and Presidio Mining Company, executed by John W. F. Peat and L. Osborn, under the terms of which the Presidio Mining Company was to pay fifty cents per ton royalty on all ore extracted from Section 5 and reduced in Presidio

Mining Company's mill. This lease was sent from El Paso by Wm. S. Noyes to his brother, B. S. Noyes, then not connected with the company, with orders to have Osborn call the directors of the company together and enter into the lease, which was done January 29, 1913. According to the minutes said lease was ratified on behalf of Presidio Mining Company in San Francisco by the votes of Osborn, Peat, Gardiner and Herger, then directors. Nothing was stated at the meeting as to the ownership of Section 5. Gardiner and Herger were ignorant of Wm. S. Noyes' connection with this property. A resolution was also adopted authorizing Wm. S. Noyes to borrow $15,000 on the company's credit. The records purport to show that on said day director Fish was removed from office and his stock transferred to B. S. Noyes, who on said day was alleged to have been elected a director in Fish's place. On request, directors Gardiner and Herger immediately resigned, and on January 31, 1913, L. M. Doherty and Wm. S. Noyes were elected directors in their places, and Wm. S. Noyes was made vice president and general manager, at the same salary he had received as superintendent, namely, $450 a month.

In the meantime, operations had commenced on Section 5 under direction of Presidio Mining Company employees; Wm. S. Noyes immediately appointed E. M. Gleim superintendent at the mine, at a salary increase of $100 per month. All expenses for equipping Section 5 for facilitating the extrac-

tion of ores were paid by Presidio Mining Company.

On February 15th following, at the first meeting of the new board, all being present (consisting of the individual defendants in this case), they adopted a resolution awarding Wm. S. Noyes $45,000.00 as a bonus for obtaining said lease between Presidio Mining Company and Silver Hill Mill & Mining Company, Wm. S. Noyes not voting thereon, but being present at the meeting. At said meeting a resolution was likewise adopted giving Wm. S. Noyes full power to employ and discharge any employees or operatives of the company.

On February 21, 1913, L. Osborn executed a one-day promissory note for $10,689.75 to Wm. S. Noyes, and as collateral turned over to Noyes 25,000 shares of his stock. Said Osborn since 1906 had been systematically each month stealing the funds of the corporation. This sum of $10,689.75 was a portion of the amount Osborn was short in his accounts. Under the $45,000 bonus resolution, $11,000 was payable "forthwith" to Wm. S. Noyes. The said sum was withdrawn from the company in two checks drawn on the company's account in Wells Fargo Nevada National Bank, signed by B. S. Noyes and L. Osborn, payable to Wm. S. Noyes, one of $6000 Febuary 24, 1913, one of $5000 February 28, 1913, and a receipt for $11,000 dated February 27, 1913, signed by Wm. S. Noyes placed in the files of the corporation. The moneys were deposited in the Anglo London Paris National Bank to the

credit and in the account of Wm. S. Noyes (695). Noyes thereupon drew his check for $5000 on February 25th, and again on March 1, 1913, a further check for $5689.75 was drawn, both payable to Osborn (576). These two checks were cashed by L. Osborn and the money re-deposited to the credit of Presidio Mining Company in Wells Fargo Nevada National Bank. No corresponding entries of these deposits were made on the company's books, nor were the other stockholders notified of the shortage of Osborn, who was thereafter continued as director and secretary at a salary of $300 a month.

During this same period of time, 5926-5/6 shares of the stock held by Osborn, and also 5000 shares from the Willis stock, were transferred to B. S. Noyes. On March 12, 1913, B. S. Noyes appears on the books of the company as having 10,926-5/6 shares of the company's stock. He paid nothing for this stock. Osborn then had only 10 shares left in his possession, he having transferred the remaining 11 shares to Wm. S. Noyes. Subsequently the larger part of the stock holdings of the defendants, aggregating 87,883½ shares, was pooled in a voting trust controlled by Wm. S. Noyes and L. M. Doherty, to continue for approximately five years.

On April 2, 1913, a directors' meeting was held and B. S. Noyes was voted a salary of $150.00 a month as president, becoming retroactive from March 1, 1913. On May 26, 1913, Wm. S. Noyes secured the deed to Section 5 from Silver Hill Mill

& Mining Company trustees, he having dissolved the corporation in the meantime having acquired all its capital stock. The total amount paid by Noyes for said stock was $24,009.33.

On March 5th Wm. S. Noyes drew $5000 additional from the company under the bonus resolution, and continued to draw moneys thereunder during the year and also at the same time under the 50 cents per ton royalty arrangements of the January 25th lease.

On October 6, 1913, at the stockholders' meeting, defendants only being present, they voted to ratify all the acts and deeds of the directors and officers done and performed during the year 1913 prior to said meeting. The annual report for 1913 was sent to stockholders in October, in which it was mentioned that Section 5 was acquired by Wm. S. Noyes and "will" be operated by the company.

On November 19, 1913, Wm. S. Noyes without notice cancelled the original lease of January 25, 1913, and made a new contract with the corporation to work Section 5 on a pretended 50-50 basis.

During 1913, Wm. S. Noyes:

(1) Under the bonus resolution claims to have drawn $24,500 up to October 30th;

(2) Under the royalty arrangements drew $2003.60, up to October 30th;

(3) And pursuant to the November 19, 1913, contract, drew $3485.90 additional, making a total of $29,989.50 he claims he had drawn by the end of December, 1913.

This amount is subject to a deduction of $3500 under date of September 6, 1913, which he did not receive, making an actual total cash received in 1913 of $26,489.50. A receipt signed by Wm. S. Noyes evidencing an apparent payment of this $3500 to him was placed in the company files and entries concerning it were made on the company's books. The amount itself thus entered covered additional thefts by Osborn from the company. It was discovered by complainants after the final arguments and submission of the case in the trial court. The total thefts of Osborn thus far ascertained are $15,196.75, of which amount he repaid $1007 to the company in February, 1917 (375 to 392, 414).

Between January 1, 1913, and December 31, 1915, Wm. S. Noyes claims he had received $63,336.20 on Section 5 account, which said sum is subject to deduction of the $3500 item, making an actual total cash received of $59,836.20, in addition to his salary.

During the summer of 1913 the cyanide plant was put in operation, the change from the old method of pan amalgamation having been effected during the spring and early summer. In September negotiations were had to build an aerial tramway one mile to carry the ore from the mine to the mill. It was put into operation on March 1, 1914.

The salaries paid to the defendants were as follows: L. Osborn, $300 per month until September 23, 1915; Wm. S. Noyes, $450 per month; B. S. Noyes, $150 per month; John W. F. Peat as assistant secretary, $25 per month, and subsequently as secretary from September 23, 1915, $270 per month.

All defendants reside in San Francisco and Oakland, and are residents of the State of California. The complainants are residents of Maryland and Kansas respectively.

In March, 1915, complainant Overton came to San Francisco to the Exposition, and during said visit called on the officers of the Presidio Mining Company in San Francisco, and discussed with Wm. S. Noyes particularly the company affairs. He obtained from Wm. S. Noyes a letter of introduction to the superintendent at the mine, E. M. Gleim. On his homeward way to Maryland he visited the property. There he ascertained that the mine and equipment, and likewise Section 5, were all of considerable value. He also learned for the first time sufficient facts to give him some idea of the actual relations between Wm. S. Noyes and the Presidio Mining Company concerning said Section 5. He also was shown by the superintendent Gleim a copy of the annual report for 1914 just sent to stockholders, and learned that the company for the first time was in debt, although the last prior annual report of October, 1913, evidenced no such condition. He notified the superintendent that he had evidently been deceived by Noyes in San Francisco, and proposed to make an investigation of the corporation affairs. On return to his home in Maryland the early part of April he received a copy of the 1914 annual report, which showed an indebtedness by the company to Wm. S. Noyes of $42,822.40 (Comp. Ex. 18, p. 2). He at once arranged

to return to San Francisco, arriving the early part of July, and began this litigation on July 26, 1915. Prior to the visit to San Francisco, the conversations with Wm. S. Noyes, and Osborn, and the return via the mine and information discovered in Texas, complainants had no knowledge of any wrongs whatsoever and no means of knowledge. They always had implicit confidence in the officers of the corporation and Wm. S. Noyes as superintendent. All annual reports had concealed from the stockholders what the defendants now claim was the true condition of the company.

The embezzlement of L. Osborn was not discovered by complainants until some time after the commencement of this suit. W. S. Overton at once initiated a criminal prosecution of Osborn. A warrant was issued for his arrest. In the meantime, on November 10, 1915, on complaint of a son of Osborn that his father was a chronic inebriate and there being no resistance thereto by said L. Osborn, he was placed in Agnews State Hospital for a term of two years. During said incarceration no criminal proceedings could be enforced. In the meantime the statute of limitations ran against the last known embezzlement of the series.

Two injunctions have issued in the case, one in December, 1915, preventing Wm. S. Noyes or any agent of his from drawing moneys on Section 5 account, and preventing the disposing or encumbering of said Section 5; the other in December, 1916, preventing the transfer of any of the original 59,-

554-5/6 shares of Osborn's stock, and impounding the same pending the further order of the court.

On December 3, 1917, after having the case under submission for one year, the court rendered its oral opinion in favor of complainants and against defendants. In announcing its decision the court stated in substance as follows:

That it was a voluminous case, and that the court had taken considerable time for consideration, and, owing to the pressure of criminal business it was better to announce its conclusions generally rather than render a written opinion under the circumstances;

That the court had taken occasion to carefully review the evidence in the case in its entirety, and likewise had very carefully considered the oral argument, the briefs and the authorities;

That its conclusions, arrived at reluctantly because of the fact of a finding of fraud upon the part of defendants, had been reached, however, in favor of the complainants' case;

That the court was satisfied from the evidence that the original acquisition of control of the company was through a fraudulent manipulation of the Osborn stock; that the Osborn shortage, came to the knowledge of Wm. S. Noyes as early as December, 1912; that he took advantage of it to secure from Osborn that stock without any real compensation, and by the use of the company funds in a manner that never resulted in the shortage being made good to it;

That this control of the corporation came absolutely within the hands of Wm. S. Noyes by a series of transactions that were not just and fair;

That the main matter for consideration in the case,—the acquisition in the name of Wm. S. Noyes of Section 5,—was enabled to be had by virtue of his getting control of the company and its board of directors; that while the transaction was not carried out in that form, it was nevertheless an acquisition of that property by funds of the company in fact; that Noyes alone, aside from his superintendent Gleim, was, of all the people connected with the company, fully cognizant of the character and value of Section 5; that while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face have borne the impress of having been procured by funds other than those of the company, nevertheless he knew at the time he had potential control of the company and that he could procure the funds from the company with which to pay for Section 5; that he pursued a course which brought that result about. The incidental transaction known as the bonus resolution was with that object in view; first, to secure the means by which to manipulate the control of the Osborn stock, and, second, it enabled him to secure the funds of the company; that and the subsequent leasing of Section 5 to the corporation defendant enabled him to procure the means with which to pay every cent paid for Section 5;

That under these circumstances, equity, which looks to the substance and ignores the mere form in which a transaction is cast, will hold Section 5 to be in equity the property of the Presidio Mining Company;

That the entire transaction, from start to finish, after Noyes got control of the corporation affairs by getting a board of directors which was absolutely under his domination, convinced the court of a uniform and persistent manipulation of its affairs, in fraud of the rights of its minority stockholders and in fact in fraud of the rights of all excepting those who were in the transaction with Noyes; and the court regretted very much to have to find that the real nature of these transactions was such as to show a uniform and persistent course of fraudulent manipulation of the affairs of this company such as really redounded solely to the interest of Wm. S. Noyes—aside from the incidental benefit that some of his board of directors secured through increases in their salaries, and the benefit which resulted to his brother in securing certain of the Osborn and Willis stock, and was in its entirety inequitable and could not be permitted to prevail; that the defendant must be called upon to account for it;

That Wm. S. Noyes must also account for the various transactions outside of that main feature of his wrong. That they were not sufficiently explained to remove the *onus* from one in control of the affairs of this company and occupying, as the court held,

a fiduciary relation to it. That Noyes had not sufficiently explained his securing of benefits from other sources; that he must account for all benefits received from the Bowers freighting and Gleim store transactions; that the tramway transaction had a peculiarly shady appearance; that all these transactions should be thoroughly searched out, because the rule is fundamental that one occupying the trust relation, which the court held the evidence fully established that Noyes did to the company, did not admit of this sort of dealing;

That because the court felt it was warranted by the law, it had decided to take the administration of the corporation out of the hands of Wm. S. Noyes, for that it was absolutely in his control, although ostensibly in the hands of a board of directors, the court was left with no doubt; that the court proposed to appoint a receiver to see if the interests of these stockholders could not be subserved by a different administration of the property, which the evidence demonstrated to be of great value; at least, at the time the control was secured by Noyes, because the income had been dissipated in one way or another so as never to reach the stockholders;

That the increases in salaries under the circumstances were not honest; that unless explained, they must be accounted for; that the bonus resolution was as bald a fraud as had ever fallen under the court's observation; that it was without any character of fundamental right in its inception; that the court would like to see the affairs managed

with such intelligence, forethought and frugality as would bring something for the stockholders;

That a decree was ordered drawn requiring Wm. S. Noyes and the other defendants as well to account for ill-gotten gains and as the result of fraud.

Both injunctions were continued by the interlocutory decree, a receiver appointed, and from which interlocutory decree and order appointing receiver the present appeals have been taken.

Argument.

I.

FINALITY OF INTERLOCUTORY DECREE AND ORDER APPOINTING RECEIVER AS AFFECTING RIGHT OF APPEALS, AND PROPRIETY OF DISPOSING OF THE CASE ON ITS MERITS.

In approaching this appeal, and before proceeding with our argument we are met with the question relative to the limits of investigation by this court concerning the finality of the interlocutory decrees.

Section 129 of the Judicial Code, U. S. Compiled Statutes 1916, Sec. 1121, provides for appeals from certain interlocutory decrees and orders.

Northern Pacific R. Co. v. Pac. Coast Lbr. Mfgrs. Assn., 165 Fed. 1, 5;

Union Pacific R. Co. v. Oregon & W. Lbr. Mfgrs. Assn., 165 Fed. 13;

Taylor v. Breeze, 163 Fed. 679-686;

American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 205-206.

The important and perplexing question presenting itself to the appellees is, whether or not this court should decide the case on its merits on these combined appeals, or simply confine itself to the question of whether or not the interlocutory decree was improvidently granted, or whether or not in the order appointing the receiver the trial court exceeded his judicial discretion.

The word "hearing" as used in said section of the judicial code is an equity term and properly applied to the argument and consideration of a case in the several stages of its orderly progress, but when applied to that upon which the case is absolutely determined—disposed of—it is qualified by the word "final".

U. S. v. Terminal Assn. of St. Louis, 197 Fed. 448.

"Hearing in equity" is trial of case, introduction of evidence, argument of counsel, and decree of court.

Amer. Grain Separator Co. v. Twin City Separator Co., 202 Fed. 205;

Pressed Steel Car. Co. v. Chicago etc. R. R. Co., 192 Fed. 517;

Root v. Mills, 168 Fed. 688.

Judge Boyd, in Taylor v. Breeze, 163 Fed. 684, defines "interlocutory" in law, as meaning not that which decides the cause, but that which settles some intervening matter relating to the cause. A judgment or decree is final if it terminates the litigation on the merits so that in case of affirmance the

court below will have nothing to do but to execute the judgment or decree it originally rendered.

Baxter v. Bellville Philips & Co. et al., 219 Fed. 309, 311;

Gladys Belle Oil Co. et al. v. Mackey et al., 216 Fed. 130.

Although a decree called interlocutory held final in its nature.

McDermott v. Hays, 197 Fed. 135;

Robinson et al. v. Belt et al., 56 Fed. 329.

In Bostwick v. Brinkerhoff, 106 U. S. 4, it is held that it has not always been easy to decide when decrees in equity are final—and there may be some apparent conflict in cases on that subject. But in common law courts the question never has been a difficult one. In law, if a case is not settled on its merits before judgment, it is not a final judgment which is appealable.

After decree is made which disposes of the principal subject of litigation and settles rights of parties, other orders may be made in which material rights of the parties may be passed upon and which, when they partake of the nature of final decisions of those rights, may be appealed from.

Farmers Loan & Trust Co., 120 U. S. 213;

O'Dell v. H. Batterman Co., 223 Fed. 295.

In the last above cited case (p. 295), the rule distinguishing between interlocutory and final decrees for purposes of appeal is thus stated:

"A decree is final when the decree disposes of the entire controversy between the parties.

> An adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal."

Reference to Master:

Where decree determines rights of the parties and refers the cause to a Master for a purpose not affecting the decree, it is final and appealable.

Marian Coal Co. v. Peale, 204 Fed. 161, 164; 172 Fed. 639;
McGourkey v. Toledo etc. Co., 146 U. S. 544-550;
Winthrop Iron Co. v. Meeker, 109 U. S. 180;
Forgay v. Conrad, 6 Howard 204;
City of Des Moines v. Des Moines Water Co., 230 Fed. 573;
Chase v. Driver, 92 Fed. 780.

When, however, the Master's functions are judicial and not ministerial only, held not appealable.

Moran v. Hagerman, 64 Fed. 503;
Bebe v. Russell, 19 How. 284-287;
Cal. Nat'l. Bank v. Stateler, 171 U. S. 449.

The appellate court has a right to enter decree on the merits, particularly involving injunctions where the whole merits of a case are involved and a decree will end the litigation.

Knoxville v. Africa, 77 Fed. 501-505;
Smith v. Vulcan Iron Works, 165 U. S. 525;
Marden v. Campbell Printing Press etc. Co., 67 Fed. 809.

These decisions, however, were given in patent cases, and decisions rendered in favor of defendants in the trial court.

There are exceptional cases referred to in the decisions which would seem to sanction a decision on the merits in the instant suit.

Forgay v. Conrad, 6 How. 204;
Thomson v. Dean, 7 Wall. 342-346;
Withrop Iron Co. v. Meeker, 109 U. S. 180.

A review of the decisions is found in Ward Baking Co. v. Weber Bros., 230 Fed. 151, 155. We also refer to Cutting v. Woodward, 234 Fed. 308.

In the instant suit the interlocutory decree settles the rights of the several parties. It finds a general fraud on the part of appellants; it decides that Wm. S. Noyes is not entitled to Section 5, and directs that within thirty days after the entry of final decree he convey the property to Presidio Mining Company; he is to receive credit for the moneys paid on Section 5 account; it further decrees that Wm. S. Noyes shall account for profits made growing out of his relation as confidential agent of the company. It further decrees that defendant Osborn shall repay the money stolen from the corporation; that all the defendants shall account for salaries and moneys obtained from the company, and that the Standing Master in Chancery conduct this accounting and render his findings. The said Master's duties, although in a sense judicial, are mainly ministerial in this case.

Appellees urge a disposition of the case on its merits, so far as compatible with circumstances. We object, however, to the statements in appellants' brief (pp. 66-70) that the grounds for a decision on the merits, among others, are the alleged defective pleadings, claimed lack of evidence to support the decree, insinuated evil on the part of appellees, and purported innocence of appellants. The pleadings and evidence show the reverse of what is so insistently urged in said brief.

II.

FOUNDATIONAL REQUISITES AS AFFECTING JURISDICTION AND PLEADINGS APPLICABLE TO THIS SUIT; THE INTERLOCUTORY DECREE.

While no attack is made on the suit on jurisdictional grounds, we nevertheless deem it advisable to insert in our brief the law applicable.

Wm. S. Noyes answered separately in the case. The Presidio Mining Company and the remaining defendants united in the same answer, represented by the same counsel, and joined in the prayer asking for a dismissal of the bill. The alignment of the parties shows foreign residents as complainants and California residents as defendants.

The law applicable has recently been passed upon during this term by this court in the decision of Cutting v. Woodward.

We take up these matters in the following order:

(a) Jurisdiction of the court and arrangement of parties.

Citing our authorities on:

1. Arrangement of parties;
2. Amount involved;
3. Diversity of citizenship;
4. Indispensable parties;
5. Stockholder's suit;
6. That such a suit must be considered a suit on behalf of the corporation.

(b) The rules applicable to the pleadings.

1. Equity Rules;
2. General requisites of a bill in equity;
3. Joinder of causes of action, multifariousness;
4. Demand on stockholders, officers and directors;
5. Pleading fraud;
6. Laches;
7. Amended or supplemental bills.

(c) The Interlocutory Decree.

(a) Jurisdiction.

Arrangement of Parties; Amount Involved; Stockholder's Suit.

Jurisdiction, as we understand it, is the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials:

1. The court must have cognizance of the class of cases to which the one to be adjudged belongs;

2. The proper parties must be present;

3. The points to be decided must be in substance and effect within the issue.

Munday v. Vail, 34 N. J. Law 422;

In re Casey, 195 Fed. 328.

On subject of jurisdiction generally see Vol. 1, Chap. 2, Title 12, Sec. 991, U. S. Compiled Statutes Annotated 1916. Sec. 24 Jud. Code.

Under the Judicial Code two elements requisite,

1. Diversity of citizenship;

2. Amount in controversy over $3000 exclusive of interest and costs.

It is the duty of the court in determining requisite diversity of citizenship to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill.

Helm v. Zarecor, 222 U. S. 36;
Dawson v. Columbia Trust Co., 197 U. S. 180;
Removal cases, 100 U. S. 457, 469;
Federal M. & S. Co. v. Bunker Hill M. & M. Co., 187 Fed. 475, 477;
Larabee v. Dolley, 175 Fed. 365—aff. 219 U. S. 121 on amount;
Stephens v. Smart, 172 Fed. 466, 471, 473;
Stewart v. Mitchell, 172 Fed. 905, 909.

In cases analogous to the instant suit for purposes of determining jurisdiction, the value of the right of the corporation sought to be protected governs and not the value of the complainants' interest therein.

Larabee v. Dolley, 175 Fed. 365, 378;
Carpentar v. Knollweed Cemetery, 198 Fed. 298.

Pecuniary value is fixed by (1) money judgment, (2) increased or diminished value of property affected by decision.

Way v. Clay, 140 Fed. 353;

Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed. 383.

Amount alleged by complainants in good faith determines the amount in controversy.

Interstate Bldg. & Loan Assn. v. Edgefield Hotel Co., 109 Fed. 692;

Kunkel v. Brown, 99 Fed. 594;

Robinson v. Suburban Brick Co., 127 Fed. 804, 806.

In a suit by stockholder for appointment of receiver, amount in controversy held to be entire corporate assets.

Towle v. American Bldg. Loan & Inv. Co. 60 Fed. 131, 134;

2 C. J. Sec. 1330, col. 2, amount in dispute, and cases cited.

From foregoing authorities it is clear that the trial court had jurisdiction in this suit so far as the amount in controversy is concerned. Complainants' pleadings evidence clearly the requisite jurisdictional amounts.

Diversity of Citizenship.

Complainant W. S. Overton is a citizen and resident of Maryland. Complainant Carl A. Martin is a citizen and resident of Kansas (1, 2). They bring this suit for themselves and any other stockholders

who desire to unite, against the individual defendants as stockholders, officers and directors, and the corporation defendant in their control. All defendants are citizens and residents of California. The individual defendants refuse to permit the corporation under their control to sue, and admit a demand on them is useless. There is requisite diversity of citizenship to give the trial court jurisdiction on this ground under the facts, and said court obtained rightful jurisdiction.

Dodge v. Woolsey, 18 Howard 341;
Davenport v. Dows, 18 Wall. 626;
Hawes v. Oakland, 104 U. S. 450, 456, 460;
Doctor v. Harrington, 196 U. S. 579, 588;
Venner v. Great Northern Ry. 209 U. S. 24-33;
Hammer v. New York Railways Co., 244 U. S. 266, 274;
Kelly v. Mississippi River Coaling Co., 175 Fed. 482, 490.

The attitude of the Presidio Mining Company was and is hostile to appellees. It appeared in joint answers with the individual appellants, and by the same counsel, denied the allegations of the bill and prayed for the dismissal thereof.

See Cutting v. Woodward, recently decided by this court.

Indispensable Parties.

The Presidio Mining Company is an indispensable party to this suit, for a judgment cannot bind it

unless joined. Said corporation being in control of the individual defendants named in the suit, and they being antagonistic to complainants, it must be made a party defendant so that proper decree may be entered binding, benefiting or precluding it, according to the equities found.

See cases above cited; also

Black v. Foreman Bros. Banking Co., 218 Fed. 266;

Gaylor v. Cooper, 165 Fed. 757, 764;

Kuchler v. Green, 163 Fed. 91, 98;

Rogers v. Penobscot Min. Co., 154 Fed. 610, 614, 616;

Willoughby v. Chicago etc. Co., 25 Atl. 281.

Stockholder's Suit.

Any stockholder of the aggrieved corporation may bring suit where the corporation is controlled by antagonistic parties whom it is proposed to sue.

Dodge v. Woolsey, 18 How. 341;

Seminole etc. Co. v. Southern Life Ins. Co., 182 Fed. 96;

Meeker v. Winthrop Iron Co., 17 Fed. 48;

Grier et al. v. Union National Life Ins. Co., 217 Fed. 294;

Trustees v. Greenough, 105 U. S. 527;

Grant v. Lookout Mountain Co. et al., 27 L. R. A. 98;

4th Ed. Pomeroy's Eq., Vol. 3, Sec. 1095.

A stockholder's suit must be regarded as one brought on behalf of corporation.

Davenport v. Dows, 18 Wall. 627;
Porter v. Sabin, 149 U. S. 478;
Hill v. Glasgow R. R., 41 Fed. 614;
Byers v. Rollins, 13 Colo. 27; 21 Pac. 896.

An action brought by a stockholder to enforce a corporate right must be regarded as a suit brought on behalf of the corporation, and the shareholder can enforce only such claims as the corporation could enforce. The essential character of the cause of action remains the same whether the suit be brought by the corporation or by the stockholder.

Chetwood v. Cal. Nat'l. Bank, 113 Cal. 425.

(b) Pleadings.

Equity Rules.

Rule 18. Technical forms abrogated.

Rule 25. Bill of complaint; contents.

This section is not mandatory, but defines what is sufficient.

Pittsburgh Water Heater Co. v. Beler Water Heater Co., 222 Fed. 950.

Rule 26. Joinder of causes of action; whether justified in bill may be considered on appeal.

Miller Rubber Co. v. Behrend, 242 Fed. 515, 517.

Rule 27. Stockholder's bill.

Rule 38. Representatives of class.

Rule 39. Absence of persons who would be proper parties, etc.

Rule 37. Persons united in interest must be joined as plaintiffs or defendants. Where any one refuses to join he may be made a defendant.

Rules 19 and 34 refer to amendments and supplemental pleadings.

Each and every one of these rules has been fully complied with in the pleadings in this suit.

General Requisites of Bill in Equity.

Bill must contain facts sufficient to maintain complainant's cause. Must set out material facts constituting cause of action so defendant will know what to meet.

Livingston v. Story, 9 Pet. 632;
St. Louis v. Knapp Co., 104 U. S. 658;
St. Louis v. Johnston, 133 U. S. 566;
Lockhart v. Leeds, 195 U. S. 427.

Complainant must show title or interest in relief sought in order to move in the matter.

U. S. v. San Jacinto Tin Co., 125 U. S. 273;
Williams v. Haywood, 98 U. S. 72.

Defendants' liability or interest in subject matter.

McClanahan v. Davis, 8 How. 170;
Ringo v. Binns, 10 Pet. 269.

Must be sufficient equity apparent on face of bill to warrant the court in granting relief prayed.

Harding v. Handy, 11 Wheat. 103;
Hardin v. Boyd, 113 U. S. 756.

In most cases general certainty only is required in equity pleadings.

St. Louis v. Knapp Co., 104 U. S. 658;
Cherokee Nation v. Hitchcock, 187 U. S. 294.

Citizenship of the complainants is fully set out, paragraphs I, II, III, amended bill (40-41). Citizenship of defendants likewise fully set out in the amended bill paragraphs II and III (41).

As to Joinder of Causes of Action and Parties; Multifariousness.

A bill is multifarious which seeks to enforce against different individuals demands which are wholly disconnected. It may be safely asserted that no bill is multifarious which presents a common point of litigation, the decision of which will affect the whole subject matter and will settle the rights of all the parties to the suit.

Brown v. Guarantee Trust Co., 128 U. S. 410, 412;
Hayden v. Thompson, 71 Fed. 60, 67, 68;
Kelly v. Boettcher, 85 Fed. 55, 64;
Curran v. Campion, 85 Fed. 67, 70;
Union Mill & Min. Co. v. Daughberg, 81 Fed. 86;
Barcus v. Gates, 89 Fed. 791;
Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 777, 780;
Rogers v. Penobscot Min. Co., 154 Fed. 613, 614;
Howard v. Natl. Tel. Co., 182 Fed. 220, 221;
Jessen v. Noyes, 245 Fed. 46, 48;
Wilson v. Castro, 31 Cal. 426-431;
Whitehead v. Sweet, 126 Cal. 75.

Each case must be decided upon its own facts on question of multifariousness.

Brown v. Guarantee Trust Co., 128 U. S. 410, 412.

The rule with regard to multifariousness, whether arising from the misjoinder of causes of action or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded on general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation upon the one hand, or drawing suitors into needless and unnecessary expenses on the other.

Jessen v. Noyes, 245 Fed. 48.

It is the constant aim of courts of equity to do complete justice, and to settle the rights of all persons interested in the subject matter of the suit, in order that litigation might not be conducted by halves, and the same persons may not be harassed by a multiplicity of suits in reference to the same subject matter. No invariable rules. Citing

Story Eq. Pleadings;

Union Mill & Min. Co. v. Dangberg, 81 Fed. 86.

Where case made by the bill is so entire that it cannot be prosecuted in several suits, and yet each of the defendants is a necessary party to some part of the case as stated, neither of the defendants can demur for multifariousness or for misjoinder of causes of action in some of which he has no interest.

Randolph v. Daly, 16 N. J. Eq. 315.

After sifting the decisions, the rule for joinder of parties and causes of action seems to be based on:

(a) Convenience;

(b) To prevent multiplicity of suits affecting same subject matter;

(c) To adjudicate all rights of various parties in same action;

(d) To prevent needless expense of suitors;

(e) To do complete justice in one suit, and not by halves.

In the instant suit there is a charge of general fraud against all individual defendants, to the detriment of the company. The amended and supplemental bill, with the amended prayer, present a common point of litigation. Each defendant is a necessary party for a full and complete determination of the matters in dispute. Each is interested in some part of the subject matter of the suit. There is likewise a common interest of complainants in the subject matter of the suit and the recovery sought. Wm. S. Noyes is sought to be made a trustee for Section Five and moneys derived by him therefrom; the corporation is sought to be held the lawful owner of Section Five, and that it obtain title thereto by a proper conveyance from said Noyes; also to recover from Osborn the moneys he embezzled from the corporation. We allege he participated in the funds taken from the company treasury under the bonus resolution illegally adopted by his vote and the other defendants excepting Noyes, but under Noyes' control.

The stock taken by Noyes from Osborn in the transactions materially helped give Noyes control over the defendant corporation and the manipulations of its affairs. All transactions had their inception in the fall of 1912, and continued thereafter,

with the connivance, collusion and conspiracy of all defendants. Exorbitant salaries paid are sought to be recovered. No element of the case can be omitted, as each is a constituent part of the general fraud charged. The bills allege the grounds of fraud. No one element could be discarded. Each defendant must be dealt with according to his individual acts through the entire series of transactions. There can be no resolution of the whole controversy into a series of separate distinct and unconnected acts which might be the basis for separate suit. There must be a uniting of the transactions into a complete whole. The logic applicable to synthesis, and not of analysis, must be applied. For this purpose a complaint framed on the acts of the parties must of necessity include the transactions complained of as a whole. There is but one general demand, to protect the corporation from fraud and recover for it and its stockholders what equity and good conscience dictate. In this suit all persons on one side (for the corporation) have an interest in the object of the suit.

Wilson v. Castro, 31 Cal. 427.

William S. Noyes' acquisition of Section 5 was a part of the program of controlling the company and manipulating its affairs to obtain funds to repay the notes given for moneys with which he paid for Section 5. This was consented to by all the appellants in the case, for salaries, moneys and benefits derived, and they collusively conspired together with him in the support of his program. It is no mis-

joinder to unite William S. Noyes with the other defendants under the facts and circumstances.

Kelly v. Boettcher, 85 Fed. 64;
Union Mill & Min. Co. v. Dangberg, 81 Fed. 86, 87;
Field v. Western Life Indemnity Co., 166 Fed. 609, 610.

Demand on Stockholders, Officers and Directors.

Equity Rule 27;
Hawes v. Oakland, etc., 104 U. S. 460;
Doctor v. Harrington, 196 U. S. 588;
Forbes v. Wilson, 243 Fed. 267;
Heinz v. Natl. Bank of Commerce, 237 Fed. 945, 948;
Delaware & Hudson Co. v. Albany etc. Co., 213 U. S. 435, 442, 453;
Wathen v. Jackson Oil Co., 235 U. S. 639, 640;
Ross v. Quinnesec Iron Min. Co., 227 Fed. 341;
Hyams v. Calumet & Hecla Min. Co., 221 Fed. 538;
Miner v. Belle Isle Ice Co., 17 L. R. A. 417;
Willoughby v. Chicago etc. Co., 25 Atl. 281, col. 2;
Wills v. Nehalem Coal Co., 96 Pac. 534, 535.

It is admitted by appellants in their answer (Par. XXI, 137, 202) that demand on them to institute suit was useless. This brings the pleadings within the rule that it is not necessary to

plead the preliminary steps mentioned in Rule 27 when the interests of the directors are shown by the pleadings to be antagonistic to those of the corporation.

Ogden v. Gilt Edge Mines Co., 225 Fed. 723.

Pleading Fraud Generally, and Constructive Fraud.

Complaint should state facts and circumstances which constitute the fraud.

Moore v. Green, 19 How. 69, 72;

Bailey v. Glover, 21 Wall. 348;

U. S. v. Exploration Co., 203 Fed. 388-340;

Miller v. Ash, 156 Cal. 566;

Notes to Huston v. Williams, 25 Am. Dec. 96;

"In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by the affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within the proper time after the discovery of the fraud. In equity suits it is also held that where a party is defrauded and fraud is concealed, or of such a character as to conceal itself, whereby the injured party remains in ignorance of it without fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the person committing the fraud to conceal it from the other party."

Dorsey Machine Co. v. McCaffrey, 38 N. E. 211.

Laches.

> "Laches has been defined to be such neglect or omission to assert a right as. taken in conjunction with lapse of time more or less great, and under circumstances causing prejudice to an adverse party, operates as a bar in a court of equity."
>
> Venner v. Chicago City Ry. Co., 86 N. E. 273.

Each case of laches depends upon its own circumstances.

> Hanchett v. Blair, 100 Fed. 827.

It depends on whether, under all the circumstances the plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.

> Marks v. Merrill Paper Co., 203 Fed. 19.

> "Laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."
>
> Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 699.

When actual fraud is proven, the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights.

> Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 39.

In cases of actual fraud a delay, even greater than that permitted by the statute of limitations, is not fatal to the plaintiff's claim.

> McIntire v. Pryor, 173 U. S. 54.

Courts of equity have no more valuable function than to protect minority stockholders from the frauds of the majority.

Backus v. Brooks, 195 Fed. 454.

On fraud in acquisition of property, and laches.

Barstow v. Beckett, 122 Fed. 146.

Laches may be excused from ignorance of one's right, or from obscurity of the transaction. What is required is that one seeking the aid of equity should use reasonable diligence in his application for relief.

Godkin v. Cohn, 80 Fed. 465.

In cases of fraud, however, it usually takes something besides mere delay to make a chancellor close the door; for instance, a change of conditions, brought about by the complainants' apparent acquiescence in the wrong, which would make a present enforcement of the claim inequitable.

Citizens Savs. & Trust Co. v. Illinois Central R. Co., 182 Fed. 612.

On laches generally, see

Michoud et al. v. Girod et al., 4 How. 560;
Prevost v. Gratz, 6 Wheat. 481;
Bailey v. Glover, 21 Wall. 342;
Rosenthal v. Walker, 111 U. S. 185;
McIntire v. Pryor, 173 U. S. 38, 54;
Saxlehner v. Eisner Co., 179 U. S. 19, 39;
Townsend v. Venderwerker, 160 U. S. 171;
Galliher v. Cadwell, 145 U. S. 368, 371, 373;
Badger v. Badger, 69 U. S. 92, 94;

Humphreys v. Walsh, 248 Fed. 214;
Pickens v. Merriam, 242 Fed. 363;
Elder v. Western Min. Co., 237 Fed. 966, 974-976;
Marks v. Merrill Paper Co., 203 Fed. 19;
Central R. Co. of New Jersey v. Jersey City, 199 Fed. 257;
Venner v. Chicago City Ry. Co., 236 Ill. 349; 86 N. E. 273;
Wills v. Nehalem Coal Co., 52 Ore. 70; 96 Pac. 528;
Miller v. Ash, 156 Cal. 544, 563, 566;
Cahill v. Superior Court, 145 Cal. 42;
Chapman v. Bank of California, 97 Cal. 155.

On distinction between limitation and laches, see

Galliher v. Cadwell, 145 U. S. 371, 373;
Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 699;
Smith v. Smith, 224 Fed. 6;
Wills v. Nehalem Coal Co., 96 Pac. 535.

The general rule is that, where there has been apparent laches in the prosecution of a suit in equity, it is incumbent upon the plaintiff, in order to repel the presumption of laches or unreasonable delay, to set up in his bill the reasons why the suit was not brought at an earlier period, stating specifically what were the impediments to an earlier prosecution of the suit.

When suit is brought within the time fixed by statute of limitations, burden is on defendant to show existence of laches. If brought after statu-

tory period, plaintiff must plead and prove laches do not exist.

Wills v. Nehalem Coal Co., 96 Pac. 535.

The pleadings show that in March, 1915, appellees first learned of and became suspicious of transactions occurring subsequent to December, 1912, in the company's affairs. Investigation was immediately begun, and suit commenced in July, 1915.

The foregoing authorities abundantly sustain appellees' position. The purported defense of laches is not well taken.

Amended or Supplemental Bills.

Equity Rule 19, 20. An amended bill is deemed to be a part of the original bill and a continuance of the suit.

French v. Hay, 22 Wall. 231, 238.

Equity Rule 38. Supplemental bill is properly for matters occurring after filing the bill, and is designed to supply some defect in the structure of the original bill. Must be in support of relief originally prayed for.

Kennedy v. Bank, 8 How. 586;
Bank v. Ritchie, 8 Pet. 128;
Whiting v. Bank, 13 Pet. 6;
Jenkins v. Int. Bank, 127 U. S. 484;
Root v. Woolworth, 150 U. S. 401.

Is a mere adjunct to original bill.

Shaw v. Bill, 95 U. S. 10.

Rule as to amendments applies to supplemental bill.

Sawyer v. Piper, 189 U. S. 154;
Vicksburg v. Vicksburg Water Co., 202 U. S. 453;
Oregon & Transcontinental Co. v. Northern Pac. R. Co., 32 Fed. 428;
Sheffield & B. Coal, Iron & Ry. Co. v. Newman, 77 Fed. 787;
Liebing v. Matthews, 216 Fed. 11, 12.

Equity may grant relief as to matters occurring subsequent to filing bill, without supplemental complaint, if within scope of original bill.

City of Denver v. Mercantile Trust Co., 201 Fed. 810.

Admissions in answer may cure defects in complaint, especially if facts are substantially set forth in the same.

Knox v. Smith, 4 How. 298;
Jackson v. Ashton, 11 Pet. 229;
Greenleaf v. Birth, 5 Pet. 132;
Cavender v. Cavender, 114 U. S. 464;
Provisional Municipality v. Lehman, 57 Fed. 330;
Richardson v. Green, 61 Fed. 431.

The affirmative defenses pleaded set up many of the salient facts in this suit, but denuded of their sinister aspects. The facts, however, being admitted and decree rendered thereon, precludes a reversal on grounds of alleged defective pleading.

We likewise submit the evidence requires an affirmance of the decree of the trial court.

(c) Decree.

Form of decree. Equity Rule 71.

Conveyance; time within which to be performed. Equity Rule 8.

Findings; not necessary as in law cases, but facts sufficient within the issues made by pleadings and sustained by evidence should be found.

Liebing v. Matthews, 216 Fed. 1-12.

See also

Peirsoll v. Elliott, 6 Pet. 95.

Decree conclusive on all issues joined.

Russell & Co. v. Lamb, 49 Fed. 771;
Kelham v. Wilson, 112 Fed. 573;
Wilson v. Smith, 117 Fed. 711;
Aetna L. Ins. Co. v. Hamilton County, 117 Fed. 84;
Russell v. Russell, 129 Fed. 438;
Thompson v. Roberts, 24 How. 240.

Decrees outside the issues invalid.

Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 713;
Reynolds v. Stockton, 140 U. S. 266;
Munday v. Vail, 34 N. J. Law 418, 422;
In re Casey, 195 Fed. 322, 328.

Court not to consider anything not in bill and exhibits.

Chicago Great Western R. Co. v. Le Valley, 233 Fed. 385;
Ward v. Webber, 230 Fed. 142, 156;

Pacific R. R. of Mo. v. Missouri Pacific Ry., 111 U. S. 519;

Richardson v. Lovee, 94 Fed. 379.

Decree must be responsive to issues.

Compton v. Jessup, 68 Fed. 295.

Decree in equity adapts itself to the necessities of the case. Distinctions between law and equity.

Payne v. Hook, 7 Wall. 432.

Its great advantage over the judgment at law is its elasticity, but it should not go beyond the relief necessary to secure complainant in what he is entitled to under the pleadings and prayer.

Underground Electric Ry. v. Owsley, 169 Fed. 671;

Hill v. Phelps, 101 Fed. 650;

Gage v. Smyth Merc. Co., 160 Fed. 426;

Lockhart v. Leeds, 195 U. S. 427-437;

Graham v. La Crosse & M. R. Co., 3 Wall. 710-712.

Decree presumed to be right.

Manhattan L. Ins. Co. v. Wright, 126 Fed. 88;

Big Six Dev. Co. v. Mitchell, 138 Fed. 285;

North American Exploration Co. v. Adams, 104 Fed. 407.

III.

ASSIGNMENTS OF ERRORS.

The assignments of error in each appeal are practically the same. They advert in substance to:

1. Pleadings.

2. Insufficiency of evidence, error of law.

3. Wrongful injunction and appointment of receiver.

Assignments numbered 30 to 62, (1125-1134) and 29 to 61, (1163-1171), respectively, pertain to general findings of fraud by the court in the interlocutory decree, to the detailed findings of decree relative to resolutions, contracts pertaining to Section 5, salaries, and also the findings relative to extra profits made by Wm. S. Noyes, the peculations of Osborn, and the directions to account before the Master; also that the court erred in decreeing that the company assets and property were dissipated; that the court should have found for the defendants and against the complainants.

Assignments 62 to 71 (1171-1175) refer to the order appointing receiver generally and specifically objecting thereto.

No good purpose would be subserved by taking up each assignment of error alleged separately as set forth in the transcript. To avoid prolixity and unnecessary argument, we have confined ourselves to the salient features of the case, the pleadings, the evidence, and the decree.

Assignments No. 2, page 1099, to 29, page 1125, and Assignments No. 2, page 1136, to No. 29, page 1163, Vol. IV of the Transcript, inclusive, having been improperly urged in the original assignments of errors, were withdrawn and are not to be considered on this appeal. See stipulation (1207).

Laches are asserted by appellants, but there is no assignment asserting laches, either in the transcript of record or in counsel's brief. Rule 11 requires that the assignment of errors shall form a part of the transcript of the record and be printed with it. Neither is there is a compliance with Rule 24 requiring a specification of the errors relied upon. Laches not being asserted in any assignment of error nor urged in the specifications in appellants' brief, we submit they are not entitled to be heard on this subject at all.

IV.

EXCEPTION I.

Vol. IV, pp. 1097, 1135, Brief 37, 50.

It is urged, although not seriously, by appellants that the court erred in refusing to dismiss the bill of complaint in so far as it seeks to hold Wm. S. Noyes as a trustee for Section 5, because the bill does not state a cause of action against him in seeking to charge him as a trustee, because:

(First) It is not averred that the Presidio Mining Company had any right, title or interest in Section 5 when purchased by William S. Noyes;

(Second) That it is not averred that Noyes was clothed with any fiduciary relation in regard to Section 5 at the time of purchase;

(Third) That it does not appear that he was under any duty to buy Section 5 for the company;

(Fourth) It is urged that the supplemental complaint, page 2, avers Noyes borrowed the money to buy said section.

A fair reading of the amended and supplemental complaints shows that the acquisition of Section 5 was a part of the general conspiracy to control and manipulate both Section 8, the company property, and Section 5 for W. S. Noyes' benefit and those associated with him. The transactions commenced in December, 1912, and on May 26, 1913, title to Section 5 was transferred to Wm. S. Noyes, during which intervening period he secured the control of the Presidio Mining Company.

He commenced in December, 1912, to carry out his plans. On discovery that Section 5 could be secured he went at once to Oregon and arranged with Benton Bowers, the company's chief contractor, for $10,000.00 for the purpose of acquiring Section 5. Then he took part of Osborn's stock, 28,607 shares, which was used as collateral in the Marfa National Bank for a further loan of $10,000.00. He arranged for these loans before examining the property and before closing any of the options for the stock. He then examined the property and satisfied himself it was worth the money before paying the purchase price.

The expenses incident to examination of the property and sampling were paid by the Presidio Mining Company, and the examinations made and the sampling done by the Presidio Mining Company employees. Moneys expended in the premises were paid by the company.

Gleim testified:

> "It was my opinion that we ought to get the property, if possible some way. By 'we' I

> mean Mr. Noyes and myself, as representatives of the Presidio Mining Company'' (565).

The company's credit was back of Noyes in handling the situation.

He alone knew the conditions and value of the property, which he had learned because of his confidential position with the corporation for so many years. He was the confidential and trusted agent of the company, in sole charge of all its affairs in Texas. Osborn, on account of his peculations, was subject to his domination, and Mrs. Willis, the other large stockholder holding the control with Osborn, was entirely dependent upon Noyes for information, relied on his judgment, and was a victim to his artful, importunate and cunning machinations.

The company's bank account was transferred to the Marfa National Bank coincident with its loan to Noyes (1071). The repayments of money borrowed by Noyes to pay for Section 5 were assured by the entire corporate assets through the bonus resolution of February 15, 1913, in the sum of $45,000, arranged by Noyes. The company's assets were utilized to actually pay for the property.

He could not have either acquired Section 5 nor worked it without the credit, support, plant and equipment of the Presidio Mining Company. Said corporation opened up the property, installed the machinery and equipment to operate, and carried on all this without the enlistment of any capital by Noyes. All overhead expenses were apportioned

to Section 8, the company property, and not to Section 5.

The results show that Noyes took wrongful advantage of his confidential relation with the company constituting that of a fiduciary, and personally profited to the detriment of the corporation. In practical effect the company funds were used to pay for the property, although ostensibly Noyes paid for the same (see oral opinion, (417) Appendix 3). Company notes could and should have been given instead of notes of Wm. S. Noyes in buying Section 5, for the company paid the money to Noyes with which he adjusted his notes in the premises. He compelled the course of activity, followed and forced matters through along the lines he wanted because he controlled the situation and used the corporation for his personal benefit. The court so found (Appendix 4). The allegations of the amended and supplemental bills under the foregoing facts are sufficient, and fully meet every objection specified under subdivisions 1, 2, 3 and 4 of said assignments of errors numbered 1 on both appeals. The complaints amended and supplemental particularly allege a complete story, and from the allegations is deduced and there was proven a charge of gross, actionable fraud, of which one specific element, namely, the purchase of Section 5, is but a part of the whole. The proof likewise sustains the allegations and the decree specifically finds against Noyes in the premises.

The court found against Noyes and all defendants on the original motions to dismiss the amended bill,

and again on the merits after a fair and impartial trial.

V.

ISSUES—BURDEN OF PROOF.

Issues.

In stating appellees' position concerning the issues in the case we are mindful of the distinctions between law and equity in the forming of an issue for purposes of presentation of the evidence and the conclusions to be deduced therefrom. We also touch upon the question of fraud and constructive trusts.

A case is at issue upon filing the answer.

Equity Rule 31.

As to answer, original or amended bills, Rules 30, 32.

An "issue" is a specific point in dispute between the parties presented by the pleadings.

Simonton v. Winter, 5 Pet. 141;
23 Cyc. 368.

A material issue is one taken on a material allegation which cannot be stricken from the pleadings without leaving it insufficient.

Antonio Tract Co. v. Higdon, 123 S. W. 732.

In equity it "is an issue upon a fact, which has some bearing upon the equity sought to be established."

Wooden v. Waffle, 6 How. Pr. (N. Y.) 145, 151, 152.

"An equity pleading frequently, if not generally, consists of an aggregation of facts and circumstances without logical dependency, but the accumulated weight of which is claimed to be sufficient to raise or defeat an equity.

If you abstract a fact you have not of necessity broken a chain, but only diminished the weight of the whole. If you have taken enough out of the scales, the equity claimed will kick the beam; but not otherwise.

It follows from this that the term 'material issue' cannot be applied to an equity pleading in the common law sense, as an issue decisive of the whole case. A material issue in such cases is an issue upon a fact which has some bearing upon the equity sought to be established."

Justice Selden in Wooden v. Waffle, 6 Howard Pr. Rep. p. 152.

Distinction is kept in United States courts between law and equity—no blending of the two allowed.

Scott v. Neely, 140 U. S. 111;
Scott v. Armstrong, 146 U. S. 512;
Langtry v. Wallace, 182 U. S. 550;
Green v. Mills, 69 Fed. 857.

Who Has the Affirmative.

He who asserts the affirmative must generally prove it.

Simonton v. Winter, 5 Pet. 148.

For discussion on burden of proof and presumptions, see

Liberty Bell Gold Min. Co. v. Smuggler Union Min. Co., 203 Fed. 803.

On presumptions in fraud cases similar to the instant suit before the court, see

U. S. v. Carter, 217 U. S. 300, 301.

Answer of one defendant not evidence against his co-defendant, but where one is affected through another it may be.

Field v. Holland, 6 Cranch. 8;
Leeds v. Marine Ins. Co., 2 Wheaton 380.

Answer of one defendant not evidence in behalf of another co-defendant.

Morris v. Nixon, 1 How. 118;
Putnam v. Day, 22 Wall. 60.

Matters set up in avoidance by defendant requires defendant to prove the matter in avoidance.

Clarke v. White, 12 Pet. 178;
McCoy v. Rhodes, 11 How. 131;
Uri v. Hirsch, 123 Fed. 569;
Lake Shore Ry. Co. v. Felton, 103 Fed. 231.

In setting forth the aggregation of facts going to make up the issue as a whole in the instant suit, complainants' position may be summed up to be as follows:

Issues.

1. That the directors and officers of the Presidio Mining Company, who are also its majority stockholders, are guilty of a breach of trust and fraud growing out of their relations with the company and its minority stockholders.

2. That said Board is under the absolute control and domination of Wm. S. Noyes,—that they are his nominees and biddable directors. That Wm. S. Noyes is the company.
3. That the defendants have all wrongfully personally profited to the detriment and injury of the minority stockholders.
4. That Wm. S. Noyes wrongfully acquired Section 5. That a constructive trust exists as to and is impressed on said section in favor of Presidio Mining Company.
5. That restitution should be made by each of said defendants according to his or her several liability.
6. That a receiver should be appointed subject to the order of this court.

Defendants' position may be defined as a general denial of all of the foregoing statements or assertions.

Our own position, comprehended in the foregoing, may be condensed into being an asserted:

1. Fraud.
2. Breach of fiduciary relations by all defendants.
3. Constructive trust impressed on Section 5.

And we submit our position is sustained by a fair review of the evidence and the law applicable.

Touching the acquisition of Section 5, an analysis of the evidence will show that it was but a single link in the chain of fraud; for

(1) The securing of options by Noyes in December, 1912, on the Silver Hill stock owning Section 5 was not an isolated transaction; because

(2) It had its inception in November, 1912, but said stock purchase culminated April 1, 1913, the legal title to Section 5 passing to Wm. S. Noyes May 26, 1913; during which time

(3) In December, 1912, the 28,607 shares of the Osborn stock were taken by Noyes and used as collateral at the Marfa National Bank to secure his $10,000 loan; an inducement to grant said loan was the changing of the company bank account from the San Antonio Bank to said Marfa Bank; and

(4) January 29, 1913, the 50-cent lease was authorized, and the change in the company directorate, begun by falsification of minutes that date, culminated January 31, 1913, when the defendants took office; followed February 15, 1913, by the $45,000 bonus resolution, of which "$11,000 forthwith" was used to conceal the Osborn shortage. This concealment was connived at, participated in, and completed by Osborn, B. S. Noyes, Peat and Miss Doherty (representing Mrs. Willis), in the presence of Wm. S. Noyes, who used said money the same month to obtain full control of the corporation by securing 25,000 additional shares of Osborn's stock, followed by the transfer of 5000 shares of the Willis stock and 3606⅓ shares of Osborn's stock to B. S. Noyes, and the further

transfer of the remainder of Osborn's stock to his brother and himself in March, 1913; without

(5) The expenditure of any money by Wm. S. Noyes, but by the giving of notes to interested parties, thereby securing the money to purchase the Silver Hill stock, the payment of said notes being fully protected under the terms of the bonus resolution, which provided for an unconditional payment to him of the said sum of $45,000, *from the company treasury, and not from any profits from Section 5;* also

(6) All expenses incurred were paid by Presidio Mining Company. William S. Noyes, its confidential agent, alone knew the conditions. He concealed the same from the directors Gardiner, Herger and Fish, and all stockholders other than those under Noyes' control. All of which

(7) Was a gross fraud, and operated to the benefit of Wm. S. Noyes and his nominees, the majority stock of this corporation, to the detriment and injury of the minority stockholders.

Fraud and Constructive Trust.

Fraud, as we apprehend and employ the term in this brief, is something more than a successful endeavor to alter rights by deception touching motives, or the employment of cunning or artifice used to deceive.

> "Fraud as a generic term, especially as the word is used in courts of equity, properly includes all acts, omissions, and concealments

> which involve all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."
>
> 20 Cyc. 8.

Courts of equity do not set any precise boundary circumscribing the area of their jurisdiction. As Lord Chancellor Hardwicke in Lawley v. Hooper (3 Atkyns 278) says:

> "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the court should be found out."

A classification of fraud frequently used by courts and text writers is:

(1) Actual or positive fraud;

(2) Legal fraud or fraud in law;

(3) Constructive fraud.

A constructive fraud has been said to be

> "an act which the law declares to be fraudulent, without inquiring into its motive; not because arbitrary rules on this subject have been laid down but because certain acts carry in themselves an irresistible evidence of fraud."
>
> 20 Cyc. 9.

Mr. Bispham uses the term presumptive fraud as applied to certain relations as follows:

> "Presumptive fraud is where the law supposes that a transaction is fraudulent from the mere circumstance of the relation of the parties or the nature of the transaction, without any

proof of actual deceit. Thus a bargain between a solicitor and client, a guardian and ward, a parent and child, a trustee and cestui que trust, *or any other two persons standing in a confidential or quasi-confidential relation,* touching the subject-matter as to which the fiduciary relation exists, will be set aside at the option of the client, ward, child or cestui que trust, as the case may be, unless the entire fairness of the transaction is abundantly proved."

Bispham's Principles of Equity (9th ed.) 1915, p. 33.

Complainants position is that there have been such confidential relations on the part of defendants with this corporation and its minority stockholders, and particularly that Wm. S. Noyes and the Presidio Mining Company at all times prior to 1912 and since have been in that confidential or quasi-confidential relation out of which the fiduciary relation emerges.

"Whenever two persons stand in such a relation that while it continues confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused, or the influence is exerted to obtain an advantake at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached, if no such confidential relation had existed."*

Bohm v. Bohm, 9 Colo. 108.

As quoted in Taylor v. Taylor et al., 49 U. S. 199, Justice Story says:

> "If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning, and overreaching bargains. If the means of personal control are given, they must always be restrained to purposes of good faith and personal good. Courts of equity will not, therefore, arrest or set aside an act or contract, merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance."

Our position is, that Wm. S. Noyes was the confidential and trusted employee, agent and superintendent of Presidio Mining Company, on whose shoulders rested the burden of conducting the company's affairs for a great many years prior to 1912. In said year Osborn and Mrs. Willis were the largest stockholders, who depended on him to operate the company's property. That conditions arose which placed the company, because of the large stockholders' dependence on Noyes. within said Noyes' power, and that he obtained a wrongful advantage to his own benefit, to the detriment of the minority stockholders.

> "A 'confidential relation' in law may be defined to be any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost

good faith for the benefit of the other party. Such a relation ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. A 'fiduciary relation' in law is ordinarily synonymous with a 'confidental relation'. It is also founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed." (Citing Civ. Code, sec. 2219 and cases.)

Bacon v. Soule, 19 Cal. App. 434.

The conditions in December, 1912, and January, 1913, were such that L. Osborn, through his thefts was brought under the control of Wm. S. Noyes; that his shortage was brought to the attention of Mrs. Willis in such a manner, and she was so suddenly called upon to act, that she did not obtain the advice of disinterested friends or counsel, but only the Noyes brothers. She was not aware of the consequences of her acts to the corporation. Miss Doherty, with no business experience, representing Mrs. Willis, blindly followed Wm. S. Noyes' dictation. Such conditions invoke the equitable doctrine as to concurrence of suspicious circumstances constituting constructive fraud announced in 10 R. C. L., 327:

"Circumstances or incidents, which, when existing in combination, are classed by courts of

> equity under the head of fraud, and so afford a ground for equitable interposition and relief. Important among these may be mentioned cases where surprise and sudden action are the chief ingredients, and where due deliberation is consequently wanting; where the victim is exposed to the cunning, the importunate, the artful, where proper time is not allowed to the party, and he acts improvidently, if those in whom he has confidence make use of strong persuasions, if he is not fully aware of the consequences but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel, and if there has geen great inequality in the bargain, courts of equity will assist on the ground of fraud or unconscionable advantage."

The Silver Hill Mill & Mining Company stock was optioned to Noyes in December, partially paid for in January, 1913, fully paid for by April 1, 1913, with borrowed money, at a time during which Wm. S. Noyes was also securing the control of the Presidio Mining Company by methods and under conditions which constitute fraud; under said facts remedial justice requires that the interlocutory decree entered in the case be upheld, for the authorities abundantly sustain the position that the fraud found vitiates the transactions complained of by complainants.

The Supreme Court of Texas, states the principle involved:

> "And it is unquestionably a common and familiar application of their 'remedial justice' for courts of equity to force upon the conscience of a party the duty of a trustee in regard to property which has been acquired by artifice or fraud, and where, either from the character of

the property or the circumstances under which it is acquired or held, it would be against equity to permit such party to hold it, except as a trustee."

Hendrix v. Nunn, 46 Texas 147.

"Fraud, indeed, vitiates transactions at law as well as in equity; but the jurisdiction of chancery is superior to that at common law, for two reasons—first, because in equity fraud has a more extensive signification than at law; and, secondly, because the relief afforded is much more complete."

Bispham's Prin. of Equity (9th ed.) 1915, p. 33.

Wm. S. Noyes was and is a trustee of Section 5, because of the fraud involved. There is a constructive trust arising out of the transactions, for

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein."

Pomeroy, 3rd Ed. vol. 3, p. 1053.

Mr. Perry observes:

"There is another large class of trusts which arise from frauds committed by one party upon another.

If a person obtains the legal title to property by such act or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations, and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society. Such trusts are called constructive trusts."

1 Perry on Trusts, 4th ed., sec. 166.

"Constructive trusts do not arise by agreement or from intention but by operation of law; and fraud, active or constructive, is their essential element. Actual fraud is not necessary, but such a trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done. Such trusts are also known as trusts ex maleficio or ex delicto, or involuntary trusts, and their forms and varieties are practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice."

39 Cyc. 169.

> "Such trusts are creatures of equity, and take form whenever title is obtained by means of chicanery, deceit or other variety of fraud actual or constructive."
>
> Sanguinetti v. Rossen, 12 Cal. App. 628.

Mr. Bispham, in speaking of constructive trusts, says:

> * * * "Certain kinds of constructive trusts are based upon fraud; in other words, equity considers that, in consequence of certain fraudulent conduct, the relationship of trustee and cestui que trust is called into being, and the rights of the parties are determined upon the footing of that relation. The ground of relief, therefore, is both fraud and trust."
>
> Bispham's Principles of Equity (9th ed.) 1915, p. 33.

Having stated our position in regard to fraud and constructive trusts so far as the law is concerned, we approach the question as to what the proof must be in this suit, and whether the proof must be measured by the rules obtaining as applied by courts of law or courts of equity. We are mindful of the observations made by Lord Hardwicke in 2 Ves. Ch. 155,

> "that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this: that courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial

proof, if of sufficient force. Circumstances of mere suspicion, leading to no certain results, will not, in either, be held sufficient to establish fraud."

Bouvier, Vol. 2 (1914) p. 1306.

Mr. Perry says:

"Equity embraces fraud of all kinds. It affords relief in many instances in which no grounds for redress whatever exist at law."

Again:

"A great many transactions are presumed to be fraudulent in equity which are not so in law, where the rule is that fraud must be proved and cannot be presumed. In equity fraud may be *inferred* from attendant circumstances; it may be presumed from the subject matter of the contract, or from the relations of the parties; or it may afford ground for relief when it simply affects third persons not parties to the transactions."

1 Perry on Trusts, 4th ed., p. 342.

"As well in equity as at law, fraud is not absolutely presumed, but must be proved. Yet, while in either forum the proof may be circumstantial, in equity an inference of fraud sometimes conclusive may be drawn upon the proof of facts less potent or less direct than would be deemed sufficient at law for that purpose."

16 Cyc. 84.

"A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design."

Vol. 2, 14th ed. Kent Comm. 484.

In Rea v. Missouri, 17 Wall. 543, Mr. Justice Bradley said:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

> "Fraud is a question of fact, but it need not be shown by positive evidence, as this can seldom be done. It is generally proved by circumstantial evidence, and may be established by inference, like any other disputed fact."

Williamson et al. v. North Pacific Lumber Co., 70 Pac. 390.

> "The proofs in cases of fraud are usually circumstantial. Frauds are a species of the crimen falsi, which, like larceny, are not done openly. They are usually shown as inferences from facts established, rather than as facts expressly proven. We will look to the character of the transaction, not for the purpose of proving this imputed fraud, but for the purpose of ascertaining whether there was any proof worth weighing of its existence."

Butler v. Collins, 12 Cal. 464.

> "In questions of fraud a wide range of evidence is allowed. Fraud assumes many shapes, disguises, and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances which are not unfrequently trivial, remote and disconnected. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. In order to do this it is necessary to pick one up here and another there until the collection is complete. A wide

latitude of evidence is therefore allowed, in order that fraud may be detected and exposed."

Merchants Nat'l. Bank v. Greenhood, 41 Pac. 259.

Again the writer of said decision on said page 259 states:

"Fraud conceals itself. It does not move upon the surface in straight lines. It goes in devious ways. We may with difficulty know 'whence it cometh and whither it goeth'. It 'loves darkness rather than light, because its deeds are evil'. It is rarely that we can lay our hands upon it in its going. We are more likely to discover it at its destination, before we know that it has started upon its sinuous course. When we discover it, the search light of a judicial investigation goes back over its trail and lightens it from beginning to end."

In Henyan v. Trevino, 137 S. W. 481, we find stated:

"Equity has a searchlight that penetrates the innermost depths of the human soul and reads its most hidden intent as though its eye were divine. When it sees the intent was fraudulent, it, with a sigh for human frailty, brushes it aside and substitutes in its stead the intention of honesty and fair dealing, and with its strong, though gentle, hand compels its performance."

Burden of Proof.

Our position in this suit is, that the burden of proof rests upon the directors of Presidio Mining Company as the majority stock, dominated by Wm. S. Noyes, to show that all their acts and transactions were fair. The rule particularly applies to Wm. S.

Noyes, who, having contracted with himself while in an official position and in a fiduciary relation, must prove that the transactions were fair and open, and that no undue advantage was taken by him of the company nor of its minority stockholders.

In Miner v. Belle Isle Ice Co., 17 L. R. A. 417, the court in discussing the question of breach of duty of majority stockholders who control a corporation to the detriment of minority, in speaking of the burden of proof says:

> "The contracts fixing salaries and rentals must therefore be held not only voidable, but absolutely void. In any case the burden is upon the director to show fairness, reasonableness, and good faith, and upon this record these transactions must not only be held to be constructively fraudulent, but fraudulent in fact."

Again, in a case involving a question of alleged misapplication of corporate funds by the majority stockholders in securing a lease at an exorbitant rental, the court says:

> "When a trustee or the officer or director of a corporation deals with himself, as an individual, or in the character of trustee, director, or officer of another corporation, with respect to the funds, securities, or property of the corporation, the transaction is at least open to question by the corporation, or, in a proper case, by its stockholders; and the trustee is bound to explain the transaction, and show that the same was fair, and that no undue advantage has been taken by him of his position, for his own advantage, or the advantage of some other corporation in which he has an interest. * * *

> When it appears that the trustee or officer has violated the moral obligation to refrain from placing himself in relations which ordinarily produce a conflict between self-interest and integrity, there is, in equity, a presumption against the transaction, which he is required to explain."
>
> Sage v. Culver, 41 N. E. 514.

Again, in Ross v. Quinnesec Iron Min. Co., 227 Fed., p. 337, concerning a bill brought by a minority stockholder seeking to set aside a contract made by a corporation through its directors who were also beneficiaries under the contract, it was held, at page 343:

> "The important question thus is whether the action of the Quinnesec directors in June, 1912 (and this was followed by like action in 1913), contracting with Corrigan, McKinney & Co. for the sale of iron ore and pig iron on the commissions stated, was a fair and reasonable transaction; that is to say, whether the payment of the commissions in question is under existing conditions a fair and reasonable corporate expense. As Corrigan, McKinney & Co. practically controlled the action of the board, and thus in effect were on both sides of the contract, the directors representing this control occupied a fiduciary relation toward the minority stockholders; * * * and the burden is on them to show that the contract was a fair and reasonable one as respects the minority stockholders." And cases cited.

In the case of Meeker et al. v. Winthrop Iron Co., 17 Fed. Rep. 50, which was a suit by a minority stockholder to set aside a lease of the mine owned by the corporation, adopted by the votes of the

holders of majority stock of the corporation, and pursuant to which said lease the benefits accrued to the said officers individually, the court in discussing the question of burden of proof said:

> "The ownership of a majority of the capital stock of a corporation invests the holders thereof with many and valuable incidental rights. They may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests, to the injury of other corporators. Any contract made by them in behalf of their principal with themselves, or with another, for their personal gain, would be voidable at the option of the company. We may therefore admit that the stockholders' meeting of October, 1881, was legally called and regularly convened (facts, however, denied by the complainants); that it possessed the power to dispace two of the existing directors and of electing three of defendants in their stead; to direct a lease of the company's mine, and dictate the company's general policy within the scope of its charter's privileges, and yet defendants would be without the legal right to appropriate the corporate property to themselves, or to make any other disposal of it for their private benefit. If they could, they would be, in effect, the beneficial owners of the entire corporate property. If they can make such a lease, they can, as selfishness or caprice shall dictate, modify its terms, expend the company's entire income in improvements to facilitate their individual interests, or do anything else their selfishness or cupidity may suggest. The

law does not thus vest majority stockholders with any such dangerous power, invite such peculations, or open the door to such abuses. If a majority of the stockholders can in any event and under any circumstances thus vote away the corporate property to their individual uses—a question that need not be decided in this case—they could only do so upon the clearest and most satisfactory evidence of good faith and for an adequate consideration; *and the burden of proof is upon the parties thus acting and claiming the enforcement of such a contract. All doubts in relation to adequacy of consideration and good faith ought to be resolved in favor of the principal.*"

VI.

DECISION AND INTERLOCUTORY DECREE.

As to the Conclusiveness of the Decision and Decree Entered.

Appellants' attack on the decision of the trial court is not premised on a failure to obtain a fair nor an impartial trial, nor is there any exception urged to the introduction or rejection of testimony, nor to passion, prejudice or unfairness of the trial judge. Under such a state of facts, the decree is conclusive, unless it be shown by appellants that said trial court seriously erred in arriving at its conclusions in making and entering its decision and interlocutory decree, or that an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts. Among others, it is held in the following well considered cases that this is the rule.

In

North American Exploration Co. v. Adams et al., 104 Fed. 404,

an appeal from a decree of the United States Circuit Court perpetually enjoining said Exploration Company from diverting the waters of a certain creek, the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Sanborn, said (p. 407):

> "It is settled by the repeated decisions of the Supreme Court and of this Court that where the chancellor has considered conflicting evidence and made his finding and decree thereon, they must be taken to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings should not be disturbed. Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; Tighlman v. Proctor, 125 U. S. 136; Kimberley v. Arms, 129 U. S. 512; Furrer v. Ferris, 145 U. S. 132, 134; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; Plow Co. v. Carson, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46."

In Manhattan Life Ins. Co. of N. Y. v. Wright, 126 Fed. 82, an appeal from a decree adjudging that the complainant was entitled to redeem an insurance policy from a mortgage to the appellant and to recover from the latter a sum of money, it was said by Sanborn, Circuit Judge (p. 88):

> "The legal presumption is that the finding and decree of a court of chancery are right, and

> they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts. Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 943, 52 C. C. A. 559, 563; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, 51 C. C. A. 369; National Hollow Brake Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 716, 45 C. C. A. 544, 567; Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549; Tighlman v. Proctor, 125 U. S. 136; Kimberley v. Arms, 129 U. S. 512; Furrer v. Ferris, 145 U. S. 132, 134; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110; Plow Co. v. Carson, 72 Fed. 387, 388, 18 C. C. A. 606, 607; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65; Exploration Co. v. Adams, 104 Fed. 404, 408, 45 C. C. A. 185, 188."

In Big Six Development Co. v. Mitchell, 138 Fed. 279, 285, on appeal from a decree in equity in a suit to cancel a mining lease as a cloud on title, for injunction and for other relief, the Circuit Court of Appeals for the Eighth Circuit, in affirming the decree of the Circuit Court applied

> * * * "the rule so well stated by Judge Sanborn, of this court, in the case of Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138, that 'the legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts'."

In American Rotary Valve Co. v. Moorehead, 226 Fed. 202, on petition for rehearing, in answer to the

claim of counsel for appellant that the court in affirming the decree and disposing of the case without written opinion, had expressly or impliedly held "that under the new equity rules, the decision of the trial court upon a disputed question of fact is binding upon the review court", the Circuit Court of Appeals for the Seventh Circuit, in a *per curiam* opinion said:

> "We had no intention of being so understood. Under the new equity rules, as well as under the old ones, the reviewing court has the right, and owes to itself and to the parties the duty, of trying the questions of fact de novo. Under the old rules, the findings of the trial court were entitled to be treated as very persuasive, and such findings were not to be disturbed, unless it appeared quite clearly that the trial court had either misapprehended the evidence or had gone against the clear weight thereof. We conceive that the new rules have made no change in those respects. Cases now are ordinarily to be heard by the trial judge in open court, while formerly they were ordinarily referred to a master. But under either set of rules, if the witnesses have been heard in open court, one element that rightly enters into the reviewing court's consideration of the evidence de novo is the opportunity of the trial judge to estimate the credibility of the witnesses by their appearance and demeanor on the stand. Espenchied v. Baum, 115 Fed. 793."

In DeLaski & Thropp C. W. Tire Co. v. U. S. Tire Co., 235 Fed. 290, on an appeal from a decree in a suit in equity involving patent rights, the Circuit Court of Appeals for the Second Circuit, in its opinion said (p. 292):

> "that while an appeal in equity brings up all the facts for review, there must come a time when the suitors' right to new investigations of complicated occurrences is properly limited to the indication of palpable error, and does not extend to discussion of matters about which all experience shows careful men may differ."

In Butte & S. Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609, a suit to quiet title and to obtain an accounting for ores taken by defendant from complainant's mine, this court, speaking through Circuit Judge Gilbert, affirming the decree for complainant, said (p. 616):

> "The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

And in

> Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 139,

on an appeal from an interlocutory decree in a suit upon letters patent, this court held that a finding by the trial court will be deferred to on appeal where the evidence does not convincingly point to a different conclusion.

In Martindale v. Waas et al., 11 Fed. 551, it is held:

> "Where main issue which controls result is determined, all others presented by pleadings are, by implication, decided in harmony therewith."

VII.

GENERAL ANSWER TO APPELLANTS' BRIEF.

Appellants' brief is premised on their presumptive innocence and good character, and that an honest rather than a guilty purpose must be presumed. Nowhere is it mentioned, however, in said brief that there likewise is a presumption of innocence and good character applicable to the appellees. The closing paragraphs on page 470 appeal to the court for a clearing of the claimed record and good name of Wm. S. Noyes, in which the other defendants join. After eulogizing this court as a place "where passion and prejudice are unknown and where the transitory storms of the hour are powerless to provoke an echo", there is, we find on analysis of the brief, a direct appeal to arouse the passion and prejudice of the court against the complainants in the suit and in favor of the defendants, the appellants here. Before opening our argument on the facts of the case, we desire to point to what seems to us to be the premises from which the writer of the brief follows his syllogism to a conclusion, hence if his premises are erroneous his argument fails.

First, an attempt is made to besmirch the character of the principal complainant in this suit,

Captain Overton, to impugn his motives, and to aver and reiterate that this is a one-man suit, brought simply by Captain Overton to vent his spleen on the alleged innocent defendants. Second, that Colonel Carl A. Martin, co-complainant, is a blank cartridge, and does not actively appear anywhere in the litigation. That the minority stockholders have given Captain Overton no support. Third, that the stock of the complainants is derivative from General Mills, and donated to both of the appellees without any consideration. Fourth, that the Mills letters indicate active opposition at all times to the installation of a cyanide plant. Fifth, that the Boyd stock was divided between Osborn and Wm. S. Noyes back in 1907, and given to both Noyes and Osborn by Mr. Boyd. Sixth, "control the management" letter. Seventh, that the witnesses Gardiner, Herger and Kniffin were unreliable and their testimony vague and uncertain; that the witness Peat, and all the other defendants in the court below were brilliant witnesses and their testimony unimpeachable. Eighth, claimed excellent equipment and efficiency of employees. Ninth, resulting or constructive trust.

We will take up the several matters seriatim in answering the motive of the brief.

As to the alleged presumptive innocence and good character of the defendants: We know no reason either in law or morals why a presumption should be indulged that one side to the suit has any higher moral tone or better flavored character than the

other side. Nowhere in the testimony in this case does it appear, and the brief presumes considerable when it points to the alleged good character, standing and reputation of the defendants, with their claimed unsullied reputations in the community. A comparison of the defendants and complainants, will show no superiority of defendants, but a great inferiority, if such word may be used, so far as character, reputation and ability is concerned, when we analyze the two sides of this case and consider the defendants' testimony, their acts and deeds covering the past several years' history of the Presidio Mining Company. Who are the complainants, and who is "Mr. Mills" so designated all through the brief? The principal complainant, Captain W. S. Overton, is an officer in the United States regular army (5, 79), with a long and successful career, and honorably retired from active service. Captain (now Colonel) Carl A. Martin, whose non-appearance is so much commented on in the brief, is likewise an officer in the United States regular army (2) and has been for many years in active service (667). During the past three or four years while this litigation has been pending, he has been serving his country and performing his whole duty, which accounts for his inability to be present devoting his time and attention to this active litigation. The statements in the brief that he has never contributed anything to the expense of this case nor lent his moral support, is unqualifiedly false, because Colonel Martin has done both. Who is "Mr. Mills", so sarcastically referred to over and over

again, etc.)? General Anson Mills is likewise an officer in the United States army, retired with the rank of general (665, 580), serving an honorable career over many, many years.

Much has been said about no minority stockholder other than Captain Overton being interested in this fight or appearing in the case. The majority of the minority stockholders reside in distant states (2). It appears from the record and the testimony that Captain Overton by reason of the support of the minority stockholders has been placed on the directorate of this company in spite of the most violent opposition of the appellants and their counsel (354, 377, 579, 592, 771). Captain Overton apexes the movement in this company represented by the majority of the minority stockholders, and he is doing his full duty by them in endeavoring to see that honesty rather than turpitude shall prevail in the corporation affairs.

It is reiterated over and over again that General Mills "gave, donated, presented", etc., stock to Captain Overton and Colonel Martin (brief, 86, 413, 422, 424, 443, etc.) and on pages 86-87 it is stated that nowhere in the record does it appear that the donees paid anything for this stock. It is equally true that there is nothing anywhere in the record that they did not pay for their stock, and it also appears in the record that General Mills' family, including Captain Overton, Colonel Carl A. Martin, the Kline family and Orndorff, paid $60,000 cash for their stock (579), and it is an admitted fact that

not one of the defendants in this case ever paid a dollar for a single share of their stock.

Appellants make frequent reference to Captain Overton's alleged haziness as to the exact number of shares he held, and the attempt is thereby made to show his lack of interest. This effort is based solely on the testimony of Mrs. Overton (wife of appellee) referring to the March 24, 1915, interview with Wm. S. Noyes, where she states:

> "We had forgotten just what stock our family owned, and we wanted to see" (635).

The facts are that Captain Overton's family referred to held many shares, and were scattered throughout the country, as follows (2):

Kathleen C. Kline, Washington, D. C.;

Lelia Kline, Washington, D. C.;

General Anson Mills, Washington, D. C.;

Katie C. Stewart, Zanesville, Ohio;

Samuel Clary and Webster Thayer, Trustees, Worcester, Mass.;

William W. Smiley, Trustee, Thorntown, Ind.;

Colonel Carl A. Martin, Fort Leavenworth, Kansas.

Appellants omitted to refer to Captain Overton's testimony (583):

> "I wrote to members of my family who had large sums involved and purposed to raise a fund for an investigation."

Appellants make the flat statement that Overton has never written to defendants for information as to the company's affairs. This is an attempt to

take advantage of the technical point that the evidence in the lower court does not appear fully in the transcript of appeal. The fact is that Captain Overton has always been a diligent and interested stockholder, and appellants know their statement is counter to the facts, for they themselves attached two of his letters to their answer to the original complaint dated August 31, 1915. Said letters were used in an attempt to prove that he had full knowledge of the company's affairs. On this account we ask the court to refer to Exhibit IV of said answer of defendants, which appears on page 42 of appendix to this brief.

In the light of subsequent developments, this letter shows a withholding of information from a large stockholder, who heard of a cyanide plant from a Mr. Lyons, of Halsey & Co., and who writes the very next day to his own (Presidio) company to ask about it.

The assertions throughout the brief that General Mills was opposed to the installation of the cyanide plant at all times is an effort to confuse the situation in 1907 with that in 1912, and is not based on fact. The evidence is all to the contrary (see Mills' letters, 665, 669). General Mills in writing to the then president, Mr. Boyd, stated that

> "if the country settles down to the business basis of a year ago and silver rises to say 60 cents, I think we might start the cyanide process up at the mine as you suggest in your last letter, saving the expensive transportation" (appendix 44).

General Mills is still a stockholder of this company. But General Mills and Captain Overton are two wholly different individuals, and at no time since Captain Overton became a stockholder has there been any appeal to him for help, either as regards a cyanide plant or in respect to the "impossible" purchase of Section 5.

The assertion likewise is made that the Boyd stock was delivered to Osborn in 1907, one-half of it to go to Wm. S. Noyes. This assertion occurs over and over again (brief, 82, 86, 96, 147, 149, 154, 156, etc.).

It will be noted that the Boyd stock was 57,213 1/3 shares, and it also appears that Osborn was a trustee for 2331½ shares, making the 59,544 5/6 shares which Osborn owned in December, 1912, before transfers took place. On interrogating Wm. S. Noyes regarding the stock transactions (747) it will be observed that Wm. S. Noyes denied any and all knowledge of the 2331½ shares and knew only of the 57,213 1/3 shares which Boyd transferred to Osborn in 1907, though there is a later attempt through an affidavit of L. Osborn to show that Noyes had always owned these 2331½ shares (314). We say there is absolutely no reliable testimony anywhere in this case that this stock of Boyd's was given to Noyes in 1907, and that it stood on the books of the corporation in the name of Osborn until December, 1912, and how can defendants reconcile their answers made individually by Wm. S. Noyes and collectively by the Presidio Mining

Company and all the other defendants, filed in this case prior to December, 1915, where they swear that Osborn owned 59,554 5/6 shares of stock; that he was the largest stockholder of the company, and that Wm. S. Noyes "obtained" 28,607 shares of said stock in 1912 from Osborn. During the argument of the case there was a direct challenge to counsel for appellants to explain the Osborn transaction (341-345) and the trial court remarked (345):

> "Mr. Harding, of course it is not alone to the positive statements of witnesses that we look in a case; it is the inferences that are to be drawn from all the circumstances under which things are done, just as potent, exactly, and usually more so, than the mere unsupported declarations of witnesses. I do not want to do anybody an injustice, but there are some things that must be cleared up in order to relieve my mind of the strong sentiment of wrong here."

We shall advert to these several matters in the course of our argument, but we say here that there is no assumption for this violence to the standards of truth assumed in the constant reiteration in the brief that Boyd gave his stock to Osborn in 1907 with orders to give half to Noyes. Repetition does not make truth, neither does vociferation take the place of cold facts. It might be interesting to note in this connection that Osborn was subpoenaed by the complainants in the court below but did not appear. If defendants were so anxious to prove the alleged truth as they appeared in their motion to reopen the case and have Osborn then come and testify, they could readily have brought him to

the trial of this case (354) to tell the truth under oath as to just what the conditions were.

What is this so-called "control the management" letter, reference to which appears no less than 25 times in the argument? Both letters introduced by defendants (621-624, Defts. Exs. A & B) appear in appendix, pages 39, 40 this brief. An analysis of said letters shows the attitude of mind of a fighting man. It will be recalled that Captain Overton went to Texas with a letter of introduction from Wm. S. Noyes addressed to the superintendent; that after conversations with Gleim at the mine he learned from Gleim sufficient to put him on notice that things were not right between Wm. S. Noyes and the corporation, and investigations were immediately begun. The attitude of Gleim called forth this letter of July 29, 1915, after, as will be observed, Overton discovered that $46 a month was regularly paid from the San Francisco office for a secret service operative known only to Wm. S. Noyes, and also shortly after Osborn had threatened Captain Overton as follows (586):

> "We have got more money than you have got, and if you do this (make a thorough investigation), we will ruin you and make a beggar of you" (586).

One can readily understand that anger and a determination to ferret out crookedness was present in the mind of the writer of the letter. It further is true that this all happened after the return east of Captain Overton in April, the arranging with minority stockholders to finance the investigation

and necessary legal steps, and that he had the backing of the majority of the minority stockholders of this company when he returned (583). Subsequent events prove that this position is correct, because at the first annual meeting permitted to be held after this date Captain Overton by proxies of the minority was elected a director and has remained on the board ever since, in spite of everything which could be done by the defendants to prevent his being there. The other letter, from Overton to Gleim, written on August 10 (commencing page 621), evidences a determination to ferret out secret codes and the methods of Noyes, and also is a request (p. 622) to have a copy of the confidential letter and a translation of the telegram referred to. This letter on page 622 shows that Overton arrived at the mine unsuspicious of Noyes after his interview on March 24, 1915.

There is nothing said in the letter of July 29, 1915, about the control of the management in the sense attributed in the brief. But it states, p. 624:

> "If I ever control the management here I pledge you my word I shall put no spy on you; I would not insult a man so."

The stress as to unreliability laid upon the testimony of Kniffin, Gardiner and Herger is likewise without foundation in fact. For instance (brief, p. 322) it is asserted that Captain Overton threatened the witnesses Gardiner and Herger. Their testimony is directly to the contrary (448, 449, 456, 457). Both emphatically testified that Captain

Overton did not threaten them; that he called their attention to records concerning the last meeting they attended as directors January 29, 1913, and which they immediately pronounced false. Neither Gardiner nor Herger had a motive in testifying falsely, being wholly disinterested witnesses. Their testimony is clean-cut, clear and convincing, and was so accepted by the trial court.

The testimony of Kniffin likewise, also a disinterested witness, when analyzed, will show clear, reliable statements, both as to time, place and occurrences. If Kniffin's testimony and statements that he had been informed of the Osborn shortage the early part of January by Gleim had been untrue, why did not defendants have Gleim contradict the statements made? He was present in court and was called as the next witness, but no effort was made by the defendants to contradict Kniffin's testimony when they had the opportunity.

The testimony of the witness Peat, on the other hand, when read will convince this court as to whether or not his testimony evidences the truth which is attributed to it in the brief. It was the testimony of a self admitted dummy, whose only interest in the company was 10 shares of stock, $25 a month and a free office (895).

All of the witnesses on both sides were seen, heard, their actions observed and their testimony analyzed and considered by the trial court. The oral opinion (417) evidences the court's attitude of mind on due deliberation for one year of the facts, the evidence,

and the law of this case. The credibility of witnesses and the weight of their testimony was all a matter for the trial court, and was duly considered and passed upon.

We likewise find reiterated in the brief no less than 52 times that this was a tottering, bankrupt corporation, pulled back from the brink of bankruptcy by the savior of the company, Wm. S. Noyes, and appellants repeatedly dwell upon the bank overdraft of $3303.72, December 31, 1912 (K. B. Schedule 15 (1008) br. 89). Commencing with January 1, 1913, and continuously thereafter until injunctive relief was applied by the trial court in December, 1915, an overdraft at the bank was a constant and familiar visitor. In the income tax return to the United States government, sworn to by B. S. Noyes and L. Osborn, dated December 31, 1914 (Ex. 14) under 6(a) it is shown that the interest payments made during the year were a total of $1392.79, of which $166.09 was interest on "overdrafts". So 1914 was fruitful of overdrafts.

The year 1915 was worse. In the income tax return (Ex. 15) under 6(a) we find "interest payments actually made during the year" were "various advances from Selby Smelting & Lead Co..... various sums.....$61.57. Notes and various sums, $304.71, total $366.28".

So the one overdraft of 1912 had grown into interest payments of $166.09 for overdrafts in 1914, and into $304.71 interest payments on notes in 1915, and 1915 was the first time the company had to

draw cash advances on bullion from Selby Smelting & Lead Co. The corporation's funds were kept drained so much by payments made to Wm. S. Noyes under the arrangements perfected the latter part of December, 1912, and the early part of 1913, that the funds flowed into his pockets and all available cash was appropriated by him in furthering his own designs and ambitions. Elsewhere in our brief we touch upon the financial condition of this corporation the latter part of 1912. It will be seen that in 1911 and 1912 the corporation had made a profit of $32,000 (994, K. B. Schedule, 2); that in the month of November, 1912, it had lost $6173.05; that in December it made a profit of $6946.71; that in January, 1913, the month the installations commenced on Section 5, it lost $2377.96 (1073). It will also be observed that in October, 1912, Wm. S. Noyes' annual report had stated the company's plant was in excellent condition. The price of silver was 60 cents; the company had no debts. It had liquid assets $53,461.32 (993, K. B. Schedule 1). To meet this overdraft of December 31, 1912, it had between $5000 and $6000 in cash and about half a month's bullion in transit (some $8000), a total of $13,000 to $14,000 (908). There always was half a month's bullion in transit at the end of the month, so that this overdraft was not a serious matter, neither was this a tottering concern on the brink of bankruptcy. The trial court was satisfied that the property was of great value when Noyes secured control (422). The premises are assumed, however, for the purpose of predicating a state of facts in-

ferring a bankrupt condition and on which an argument can be based and authorities applied, as is so skilfully done in appellants' brief; but if the facts and premises are incorrectly stated and are not true, the argument of necessity falls. Logic cannot supply the place of facts and conclusions based upon false premises must lead to barren results, however attractively they are garbed. The conditions surrounding the occurrences of December, 1912, and in January and February, 1913, prove the company not a bankrupt, and the $3000 overdraft not a serious obstacle nor indicia of bankruptcy claimed so often in appellants' brief. Had integrity been the watchword instead of dishonesty and appropriation and misappropriation of the company's assets and funds, and the proper taking to task been had of Osborn, we dare say that the $10,689.75 could have been recovered, or Osborn's stock seized and sold for whatever it would bring. Proper action in the courts could and should have been maintained to recover the moneys stolen by Osborn from the company treasury, which would have been considerable assistance to the corporation. Instead, this shortage was made the vehicle through which Wm. S. Noyes was able to acquire the Osborn stock through the bonus resolution and the use of the $11,000 shuffled through the front door of the corporation around in through the back door, and in the operation he and his brother B. S. Noyes acquired with company funds all of Osborn's stock but ten shares. This process is admitted in appellants' brief, page 232.

How then can it be said with any degree of accuracy that the corporation was a tottering and bankrupt concern in December, 1912, when the proof shows, as we shall hereafter analyze the evidence and the figures and facts, that the company was prosperous, with a good outlook and a good future, even though handicapped by the double burden of Osborn's peculations in San Francisco, and Wm. S. Noyes' secret profits in Texas. The record likewise shows that at the commencement of litigation the company had an overdraft and continued to have overdrafts for several months thereafter until the injunction was issued; but the claims of Wm. S. Noyes on Section 5 account continued to grow and mount under the pernicious arrangements of the November 19, 1913, contract, so that at the time of the submission of the case there was a showing of liquid assets of $62,000, and a claim by Wm. S. Noyes against the corporation of approximately $80,000 (1058, 1060). The corporation was bankrupt at all times after 1913, and existed only by sufferance of Wm. S. Noyes. It was prosperous before 1913 and never had an indebtedness of any kind or character. Its only creditors were those acquired after 1913, the principal one being Wm. S. Noyes.

Another contention of appellants is based on misconstruction of statement of counsel for complainants in court, that "our whole contention" was that Wm. S. Noyes borrowed the money to purchase Section 5, giving notes for the same, and that they were not paid until a year or a year

and a half thereafter. The brief constantly refers to this one particular feature. The statement was made, as the context of the testimony will reveal, during a discussion as to the cost of Section 5. It referred to the cost of Section 5, and nothing else. We never at any time or place have referred to the purchase of Section 5 as "our whole contention". On the other hand, we have always referred to the general fraud charged against all the defendants, and that one of the elements was the wrongful acquisition of Section 5 by Wm. S. Noyes under all the facts and circumstances. Yet it is constantly reiterated that the "whole contention" of the complainants is that Section 5 was bought with the money of Wm. S. Noyes on his own credit and resources, and that we claim the company provided the moneys to repay the loans, without being able to follow the identical funds into Noyes' pocket and then into the hands of the holders of his notes. We submit such a theorem is untenable. We emphasized our position in our opening argument before the trial court that the theory as stated by Mr. Harding, that we were pursuing Section 5 alone, was not true; that our position was, that we were going into all the affairs of the corporation; that we alleged a constructive trust because of the fiduciary relations and agency of all the directors and officers of the corporation, particularly with regard to Wm. S. Noyes, because we alleged he dominated the corporation. The theory of our case is fraud, and that as one of the results of the fraudu-

lent practices shown, a constructive trust arises as to Section 5.

Further objection is made in the brief to two items:

(a) The finding relative to transfers of stock to Frank M. Parcells and J. D. Ralph;

(b) That the decree interferes with the prerogatives of the holders of the Willis stock in some vague manner.

The contrary from what is announced in appellants' brief (34-36), appears from an analysis of the relation of Parcells and Ralph with this company. The stock transferred to Parcells and Ralph is traceable back through the Noyes brothers to the original 59,554-5/6 shares of the Osborn stock. After the hearing and argument of this case in August, 1916, and in the month of October, the Noyes brothers began to split the Osborn stock into small parcels, and certain shares of the Osborn stock were passed to Frank M. Parcells and to Ralph. An order to show cause and a temporary restraining order was issued, a subsequent hearing had thereon (293), which shows that this stock was a portion of 87,883½ shares in the voting trust, viz., that of Osborn, Mrs. Willis and Noyes, and following the order to show cause, and after hearing at which Parcells and Ralph had full opportunity to present their side of the case, injunctions were issued based upon proper affidavits, preventing the passing on of any of the Osborn stock, but impounding 59,-554-5/6 shares with the Clerk of the Court, sub-

ject to the final order of the court; and until final decree is entered settling and fully establishing the rights of these parties, we fail to see where said Parcells or Ralph have been injured.

(b) Concerning the objections to the relations of the Willis estate and Miss Doherty and the Willis heirs: None of the stock of Mrs. Willis or Miss Doherty was impounded. The decree refers to the transfers made of the Willis stock, particularly the acquisition of 5000 shares thereof by B. S. Noyes without any consideration, as being a part of the illegal and fraudulent schemes perpetrated on the shareholders of this corporation by its majority control. There is no ground for complaint here that we are aware of, surely not such sufficient ground as to warrant a reversal of the decree. But appellants do not seriously urge this point. Nevertheless, we deem it necessary to fully controvert any such points raised by the argument. If there is any merit to appellants' contention, which we deny, for they had a full opportunity to be heard and a full and fair hearing, and the court after deliberation felt justified in taking the steps it did,—nevertheless, if there be any merit to the objection, it is clearly an error without prejudice.

Error without prejudice is no ground for a reversal.

Sipes v. Seymour, 76 Fed. 118.

In Gorham Mfg. Co. v. Emery-Bird etc. Co., 104 Fed. 244, it is said:

> "When the trial court has considered conflicting evidence and made its findings, they must be taken as presumptively correct unless obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence."

These transactions were had a year prior to the decision of this case, and the court had the evidence and the data concerning the hearing relative to the Parcells and Ralph transfers of stock, and we submit that its ruling is presumptively correct on the interlocutory decree. The final decree will settle and determine all the rights of the parties in the case.

Again, the court holds in Nat'l. Bank of Commerce v. First Nat'l. Bank, 61 Fed. 812:

> "Moreover, a careful perusal of all the evidence concerning the admission of which any question has been made has convinced us that, whether that evidence was admitted or rejected, the result in this case must have been the same, and the bill of the appellant must have been dismissed."

The evidence in the instant suit must be considered as decisive on the questions of fraud, for fraud being found, minor details such as those objected to give no ground for a reversal.

> "If every slight defect or slip which a microscopic eye can detect in a question or answer or the charge of the court is to be counted prejudicial error, litigation will become interminable over subtle refinements and quibbles which were not seen or regarded by the Judge or jury at the trial, and which had no bearing whatever on the decision of the case on its merits. Such

> an administration of the law would be intolerable. 'But there is nothing', said Judge (now Mr. Justice) Brown, of the Supreme Court of the United States, 'which tends to belittle the authority of the courts, or to impair the confidence of the public, in the certainty of justice, as much as the habit of reversing cases for slight errors in admitting testimony, or trifling slips in the charge. Better by far the practice of the English courts and the Federal Supreme Court, where every intendment is made in favor of the action of the lower court, and cases are rarely reversed except for errors going to the very merits,—errors which usually obviate the necessity of a new trial'."
>
> Quoted in the case of Missouri K. & T. Ry. Co. v. Elliott, 102 Fed. 106.

As to the claimed admission of complainants as to the excellent plant and equipment and high efficiency of the employees at the mine alleged in the original bill of compaint in this suit:

The allegation in the original complaint so much insisted on as precluding the right to a receivership in the instant suit is found in paragraph XVI, page 24 of the transcript, and states that within the past thirty days the prior facts set forth in the complaint were discovered by Captain Overton; that on or about March 24, 1915, he had interviewed L. Osborn and Wm. S. Noyes;

> "that thereafter, on his way back east said W. S. Overton stopped at the said Presidio mine in Texas, and then and there first noticed the excellent equipment of said plant and the organization and efficiency of the employees and the operations of said mine and mill. That subsequently, and after conference with the other

> complainants herein" (which referred to the following shown on page 2 of the transcript, to wit: Kathleen C. Kline and Lelia Kline, residents of Washington, D. C.; General Anson Mills, a citizen of El Paso, Texas; Katie C. Stewart, a resident of Zanesville, Ohio; Samuel Clary and Webster Thayer, trustees, who reside in Worcester, Massachusetts; and William W. Smiley, a trustee, who resides in Thorntown, Indiana); "said W. S. Overton returned to San Francisco about July 5, 1915, and examined such minutes and books as were to be found in the company's office in San Francisco, where he discovered that many of the documents, papers and records relative to the company's affairs were in the private possession of Wm. S. Noyes in the Mills Building, San Francisco;"

which is followed by allegations in said paragraph XVI relative to the necessity for sequestration of the books and records of the company.

This statement as to the equipment at the mine refers to the attitude of mind of a non-resident stockholder not familiar with mining operations, who from all the reports and information obtained from time to time during his connection with the company supposed that the corporation had a small, inferior, equipped mine and mill; and here he notices that there is a tremendous amount of equipment, machinery, a large number of operatives employed, and in stating such observations he alleges that he first noticed the excellent equipment of said plant and the organization and efficiency of the employees. There is a great difference between a few of the principal officials of the company domi-

nated by Wm. S. Noyes in San Francisco, and the rank and file of the employees, principally Mexican labor, out in the hills of Texas. The rank and file of the actual laborers of this corporation undoubtedly have always earned their pay and have given actual services for compensation received. This, however, cannot be construed to have such a serious and far reaching effect that said statement made under the facts and conditions precludes the appointment of a receiver or the granting of injunctive relief, notwithstanding any showing of gross, palpable and proven fraud of the most malignant type. Further, this was long before the discovery of any of the hidden concealments showing the thefts by Osborn, the fraudulent entries in the books, the falsification of the minutes of January 29, 1913, the false system of assaying, the dollar differential, or the side profits made by Wm. S. Noyes.

It is insisted all through the argument that the original theory of the complainants was one of a resulting trust as to Section 5. The theory of complainants always has been that there was gross fraud perpetrated upon the corporation and its minority stockholders by the majority as the company directors and officers, confidential employees and agents; that they jointly and severally participated in a fraudulent conspiracy and scheme to defraud, with full knowledge of the facts, with the deliberate intention of defrauding the corporation and the minority through the domination and con-

trol of Wm. S. Noyes; that out of this mass of fraud evolved the acquisition of Section 5 under such circumstances and conditions as imposed a constructive trust under all the principles of equity jurisprudence, whereby the corporation became the real owner of the property; that Wm. S. Noyes held the same in trust for said corporation subject to its purchase price. Paragraph XIII of the original bill of complaint, commencing on page 7, transcript, and paragraph XIV commencing on page 18, all set out the theory, showing wrongful acts on the part of defendants, and on page 20 it is set forth that Wm. S. Noyes in his own interest and in derogation of the rights of stockholders, made large sums of money from his connections with Section 5, and otherwise while conducting the corporation affairs as its manager at a salary of $5400 per annum; that he had transferred to himself Section 5, knowing that it should have been purchased with its own funds and resources and transferred to the Presidio Mining Company from the Silver Hill Mill & Mining Company. And then the further allegations follow:

> "That your orators are informed and believe and upon information and belief allege, that said Wm. S. Noyes received from the treasury of this corporation more than sufficient funds and moneys with which to pay for said Section 5 aforesaid, and at the times when payments were made by him for said Section 5 and on information and belief your orators aver that the moneys received from said Presidio Mining Company, as aforesaid and paid to said Wm. S. Noyes by said corporation, were greater

in amount than the moneys which he paid to said Silver Hill Mill & Mining Company therefor."

Then follow further allegations that Noyes was authorized to collect the sum of $45,000 by the bonus resolution, and that he should receive the said sums as fast as the corporation treasury could stand the withdrawals; and that he maliciously and deliberately kept the corporation drained of funds by virtue of the resolution knowing it to be a fraud; and on information and belief it is further alleged (p. 21) that he used a part of said bonus to purchase the entire Section 5, and that the entire price, it is alleged on information and belief, of said Section 5 was not in excess of $25,000.

These and other allegations follow along the same lines, and they must be construed in connection with the entire complaint and not lifted from the complaint and isolated, and from said isolated lifting a syllogism developed on said premises, from which the conclusion is erroneously drawn that this was the one and sole question in the case, and that there is alleged only a resulting trust.

It will be observed in going through the record in this case that the facts were ascertained progressively: First, there came the suspicions at the mine on the first return trip home by Captain Overton the end of March, 1915, ripening into a conclusion that the company had been defrauded by Wm. S. Noyes; the consultation with the eastern stockholders, the financing of a return trip after

said consultation, showing that it could not possibly be a "one-man suit", but representative of a part of the minority stockholders whose investment in the corporation stock was $60,000. The return to San Francisco and the investigation, and the discovery of a portion of the truth with regard to the approximate cost of Section 5; the filing of the amended bill; then followed the discovery of the shortage of Osborn, the manipulations of the company books, falsification of minutes and records, by which time additional proof had been brought to light. Then followed the supplemental complaint setting forth these additional facts discovered through all these months of patient investigation and search both in San Francisco and Texas, notwithstanding the concealment of records and refusal to allow free access to the books of the corporation, and blocking by actual orders from the president in San Francisco of full investigation at the mine in Shafter. These are all matters embodied in the pleadings contained in the amended, and particularly the supplemental complaint. We submit that the entire record, together with the proofs adduced during the trial of the case, clearly show not a resulting trust, but a constructive trust as to Section 5, and actual fraud, so far as the falsification of the records and minutes and acts and doings of the Osborn stock transfers is concerned.

The objections made to the complainants' pleadings are laid as a foundation in appellants' argument, and the premises assumed that the burden is

entirely upon the complainants to trace the trust funds into the pockets of Noyes and then through Noyes' pockets again into the hands of the parties to whom he distributed moneys in payment of notes. The rule undoubtedly is that in matters involving trust funds where there are no features of fraud such as are involved in this suit, it is necessary in order to recover, to trace the said trust funds and follow each step in the process from the time the moneys left the coffers of the complaining party until they reached the hands of the ultimate distributees. But we feel safe in asserting that no case can be found where a scheme of fraud such as exists in this suit was uncovered growing out of fiduciary relations where such a rule has been followed. The rule is that the burden of proof to show fairness is upon the directors and officers of a corporation, and particularly upon a man in the position of confidence and trust such as was Wm. S. Noyes in his relations with the company as its sole and exclusive managing agent of mining affairs in Texas prior to 1913, and subsequent to 1913 the sole dominant control of all its operations, both here and in Texas. Under such facts we believe the burden of proof is clearly upon all the defendants, and particularly upon Wm. S. Noyes. We are sustained by numbers of cases, particularly the cases relating to fiduciary relations of an agent and confidential manager such as Wm. S. Noyes was, and particularly touching secret and concealed profits such as Noyes made through contractual relations exist-

ing between his principal, the corporation, and third parties. See

U. S. v. Carter, 217 U. S. 305-310.

VIII.

PRINCIPAL ARGUMENT OF APPELLEES, WITH ANALYSIS OF FACTS.

In this main portion of our argument we address ourselves to the following:

1. General survey of the conditions existing prior to January, 1, 1913:
   - (a) Company plant;
   - (b) Price of silver;
   - (c) Finances;
   - (d) Liabilities;
   - (e) Credit;
   - (f) Wm. S. Noyes' finances;
   - (g) Relations existing between the several defendants and Mrs. Willis.

2. Fraudulent manipulations:
   - (a) Acquisition of Section 5 by Wm. S. Noyes;
   - (b) Acquisition of the Osborn stock and control of corporation by Wm. S. Noyes;
   - (c) Management of the corporation since December, 1912;
   - (d) Secret side profits of Wm. S. Noyes.

3. Witnesses:

(a) Attitude of defendants;
(b) Conflicting testimony;
(c) The $3500 transaction.

Company Plant.

In 1912 the company plant was in good condition. In Wm. S. Noyes' annual report to stockholders dated October 1, 1912, he states (600):

> "The machinery in the mill having become badly worn through continued use, it was necessary during the year to install a new oil burning engine at a cost of $17,392. This will effect a large economy in operating expenses. In addition, the mill and other buildings required extensive repairs and all these consumed the the operating surplus for the year and drew some on the available cash reserve. These extraordinary repairs are about completed, and the company's plant is now in most excellent condition.
>
> The mine has just about maintained its own in respect of quantity of ore reserves, but the grade, or silver contents of the same, is perhaps a little lower than at the corresponding period of 1911.
>
> Yours very truly,
> Wm. S. Noyes, Superintendent."

This excellent plant is the one that, within sixty days thereafter, Noyes decides to tear down in favor of a cyanide plant. Was this sudden decision to install the cyanide plant due to a drop in ore values "the ores goes up and down; it always has done so"; B. S. Noyes' test. (1059), or was it due to the fact that Noyes in November learned from Gleim he could acquire Section 5?

In the above letter Noyes reports a net profit to the company of $17510.14. In 1911 and 1912 the company had made a profit of $32,823.32 net (K. B. Schedule 2) (994). The schedule shows that the company had been treating 19-ounce ore and better during those two years. Noyes knew of these values. In the crucial period from November 1, 1912, to April 30, 1913, there was a profit from both sections of $23,379.33 (Defendants' Ex....., 1073), nearly equal to the total purchase price of Section 5. During said period the pan-amalgamation process was used, with a consequent high treatment cost. The cyanide installation was perfected and put into operation in August of 1913, whereby it is claimed that costs of operation were nearly cut in half. Nevertheless, the corporation has never made a profit since the cyanide plant was installed (Wm. S. Noyes got it all), but did make a profit with the pan-amalgamation method.

Price of Silver.

From 1897 up to 1912 silver reached 60 cents but twice, i. e., 1906-1907. In 1909 it dropped to 49 cents. Thereafter it steadily rose up to and including 1913. In 1912 the average price was .5696, but it was:

.6126 Sept.-Oct., 1912 (Wm. S. Noyes' table of prices, Tr. 715).

.5110 Nov.-Dec., 1912 (Wm. S. Noyes' table of prices, Tr. 715).

These figures show that the price of silver was at its zenith during the so-called "precarious" period so much emphasized by the defendants.

Finances (K. B. Schedule 15. (1008).):

On November 30, 1912, the assets were:

Cash in bank	$ 8,380.91
Bullion in transit	10,605.03
Supply inventories	22,752.15
Miscellaneous:	
Drafts	450.00
L. Osborn	10,689.75
Total assets	$52,877.84

Liabilities.

Current:	
Mine cash overdraft and unpaid invoices	$11,612.44
Net worth	$41,265.40

One month before this the report to stockholders had stated the company's plant was "now in most excellent condition". A company with a plant in most excellent condition and with assets exceeding by $41,265.40 all its liabilities, is in a good financial condition. It is further evident that with an operating cost of $9.50 per ton and a profit of $32,000 and upwards during the preceding two years under said system, and with a cyanide plant installed which would cut the cost approximately in half, the future of the company from a financial

standpoint was certainly good. It was a solvent, going concern with a good future ahead of it, all of which was well known to Wm. S. Noyes, the only man who did know the real existing conditions and possibilties of the company's plant and property.

Credit.

The credit of this company was undoubtedly good. The El Paso Foundry & Machine Works extended a credit of $12,061.60 for new machinery and equipment. This concern for years had done business with the corporation and always received its money. E. G. Gleim loaned the company $14,000 to assist in the new development. He was one of the principal men in Shafter most vitally interested in the company's welfare, for he was the sole owner of the E. G. Gleim Company store (731, 745, 775), which lived on the miners' trade, which was so valuable that he paid Wm. S. Noyes monthly commissions for the business secured from the corporation employees (773). Mr. Gleim had grown prosperous through his connections with the corporation and the trade given him through Wm. S. Noyes' agency as sole representative of the corporation. Gregg & Gleim are alleged to have advanced a credit of $16,000 on the tramway, commenced in September, 1913. Said Gregg & Gleim for years had been hauling the company's ore at a rate of 85 cents per ton, likewise through contractual relations negotiated by Wm. S. Noyes on behalf of the company. Wm. S. Noyes bound the corporation to pay them

a profit of $9000 (604) as a bonus on the loan, and then had the company bind itself under Noyes' direction to pay ten per cent per annum on the $16,000. The trial court in its oral opinion (421) holds that the tramway transaction had a peculiarly shady appearance. These were all obligations of the Presidio Mining Company. None were incurred as a personal liability of Wm. S. Noyes. He used the corporation to install the cyanide plant on its own credit and responsibility. From the time it started to operate the Presidio Mining Company lost money continuously, while Wm. S. Noyes obtained all the benefits. In addition, during the time of this alleged financial stress on the part of the corporation, Wm. S. Noyes drew from the company treasury during the year 1913 more than the purchase price of Section 5, and laid the foundations for the obtaining of all the assets of the corporation in the future.

Wm. S. Noyes' Finances.

On page 137 of this brief we show the times of payments for Section 5 stock by Noyes, aggregating $24,009.33; on page 138 the times of repayment of notes given by which the money was secured to pay for such Silver Hill Mill & Mining Company stock, and the times and payments of withdrawal of funds from the Presidio Mining Company by Wm. S. Noyes. He had no ready money of his own in December, 1912 (Tr. 186, 213). He had 1382 shares of the capital stock out of 150,000 shares. His financial condition was such that it was an impos-

sibility for him to borrow money on his own credit with which to either acquire Section 5 for himself or operate it after he had acquired the same. The evidence is clear and convincing that he borrowed the $10,000 from Benton Bowers, an interested party with him in transactions of the Presidio Mining Company; $10,000, from the bank, putting up as collateral the stock he had taken from Osborn in December, and gave the $5000 note to Harry Young, who would likewise be a participant in benefits which Noyes could give him in Shafter through company business and company operatives purchasing from the Young store (745). Men do not plunge into transactions of this sort involving the outlay of thousands of dollars without a foundation on which to build; neither do bankers nor business men give credit to an individual such as was here extended without a positive assurance of repayment. Self-interest precludes risks of this sort. Each and every one of the parties loaning money to Wm. S. Noyes knew that Noyes had the backing of the Presidio Mining Company, that it was a prosperous concern, that Noyes was the sole managing agent with whom they had always dealt, that his favors had been bestowed upon them, and they expected a continuation of the same. It is clear from the evidence in this case that Wm. S. Noyes would not have had the support of these various parties without the corporation itself assuming responsibility, and this responsibility was assumed by the corporation.

Relations Existing Between the Several Defendants and Mrs. Willis.

When Wm. S. Noyes left for Texas in December, 1912, we are satisfied, and so was the trial court, that he knew of the Osborn shortage and had Osborn in his control. The transfers in December of the 28,607 shares of stock, the splitting of these 28,607 shares on January 9, 1913, into 10,000, 5000, and 13,607 shares respectively, and on the same date the splitting of the Osborn certificate into 10,000, 5000, and 13,606⅓ shares respectively, in San Francisco, while Wm. S. Noyes was in Texas, and only a few days before the deposit of Noyes' share of this stock with the Marfa Bank as security for the $10,000 loan, indicates a collusive operation carried out in San Francisco by the brother, B. S. Noyes, operating with Wm. S. Noyes in Texas prior to the alleged date of the discovery of Osborn's shortage by Noyes, namely, January 19, 1913. The acts of the parties indicate that the Osborn shortage was known to Noyes before he went to Texas in December, 1912, and that he took the 28,607 shares from Osborn with a preconceived idea and plan subsequently carried out. Mrs. Willis looked to Wm. S Noyes for information (817, 818). She was an aged widow. On January 23, 1913, Wm. S. Noyes wrote the Willis letter, holding out to her inducements that she would receive dividends of approximately 50 cents per share per year if she allowed Noyes to carry out his plans, coupled with the condition that a new board of directors should be elected. She being the owner of 36,956⅔ shares of stock, with

an income dangled before her eyes of over $18,000 a year, naturally would consent to almost any arrangement made by Wm. S. Noyes.

The evidence shows that under the sudden surprise concomitant with the announcement of the Osborn shortage, this aged widow, in not too affluent a financial condition, indicated by her offer to turn over her stock if it would help (810), was ready to submit to almost any plan. She was an easy prey to these two brothers. Observe Wm. S. Noyes' statement to her, "I told Mrs. Willis that if it ever got out the company was gone" (693). She did not consult independent disinterested friends or counsel (689, 693). Surprise and sudden action were the chief ingredients in her course of conduct. Due deliberation was wanting. The letter dated January 23, 1913 (537), the interview of B. S. Noyes about the same time (906), the removal of the old directorate, the appointment of the Noyes brothers and Miss Doherty, the companion of Mrs. Willis, followed within a week from the date of the letter written by Wm. S. Noyes in Texas after he had perfected his plans there. Shock, bewilderment, sympathy, prospective loss, confidence, persuasion, money, all played their part upon this aged widow's mind. Before another month was over, she had parted with 5000 shares of stock taken from her under these circumstances by B. S. Noyes, the brother, without consideration (911), but after aiding his brother, Wm. S. Noyes, in his manipulations. Miss Doherty represented Mrs. Willis, and

thereby reflected Mrs. Willis' attitude of mind. She testified (817):

> "Mrs. Willis and myself relied entirely on the suggestions and statements of Mr. William S. Noyes as made to us both—relied absolutely; she had every confidence in him; I relied entirely upon his judgment."

And on 819 we find:

> "The Court—What was suggested as to the purpose of that (voting trust), desirability of it?
>
> A. As well as we understood, it was to give Mr. Noyes the majority.
>
> The Court—The control?
>
> A. Yes, the control of the stock, I believe."

Peat was a dummy working for a salary under the control of Wm. S. Noyes. Gardiner, Herger and Fish, the majority directors, were never notified of any of the facts and conditions (444, 454), but were summarily dismissed, the present defendants then taking office.

With this general survey of the conditions, we now advert specifically to the facts and circumstances developed by the pleadings and proof in this suit touching the fraudulent transactions, comprising three principal features:

2. Fraudulent Manipulations.

A. Acquisition of Section 5 by Wm. S. Noyes;

B. Acquisition of the Osborn stock and control of the Presidio Mining Company; and

C. Manipulations, acts and conduct of all the parties defendant generally under the

control of Wm. S. Noyes subsequent to December, 1912.

D. Secret side profits of Wm. S. Noyes.

The sum total of these features, together with the adherent facts, circumstances, conditions and results develop a most shocking case of fraud. In our search through the decisions we found no such glaring fraud as exists in this case, perpetrated upon the corporation by a single individual, with concurrent manipulations, conspiracy and collusion, such as participated in by all the defendants in this case,—a gigantic fraud so controlled and operated that all the profits which could be made under the system devised adhered to the pockets of Wm. S. Noyes, and, in proportions dictated by him, to the others assisting in its perpetration. There is only one fraud. It is composed of three principal features. We touch now upon the first of these:

(a) Acquisition of Section 5 by Wm. S. Noyes.

Appellants' brief (pp. 155 to 306 inclusive) deals with Section 5. We shall touch on the principal features of appellants' argument, and then pass to a statement of the facts and circumstances as revealed during the trial of the case. From the evidence we submit may be deduced the true principles of law, which are simple and clear. The citation of numerous authorities on each independent point does not enable us to arrive at the truth unless we assume the correct premises and the actual facts as they existed on which to build our syllogism and from

which we must deduce our conclusions in order to properly apply the law applicable.

In the first place, Section 5 and Section 8 are practically one property, separated only by an imaginary line (see Defts. Exs. LL and MM). The history of both sections was well known to Wm. S. Noyes, as he had operated Section 8 for 29 years in December, 1912, and Section 5 for many years as well, and during the period of operation of both properties the ores from both sections were treated in the one mill, likewise under the direction of Wm. S. Noyes. The geological character of both sections is the same. The ores are found in limestone replacements. On page 80 and 203 counsel speaks of the property as being a "pocket mine". From this statement, unless explained, it might possibly be understood by the court that this pocket mine, so-called, resembled, or was similar to what is ordinarily known in California as a pocket mine. As a matter of fact, the deposits in this property are replacements in limestone ranging from a mere streak to immense kidneys or lenses of ore containing thousands of tons. For instance, the ore body in Section 5 later known as "Stope 13", Mr. Noyes and Mr. Gleim both testified was estimated to contain from 10,000 to 20,000 tons of ore, with a value anywhere from $100,000 to $400,000. Mines containing ores of this character and nature are not properly designated "pocket mines", as the term is ordinarily understood and accepted in California.

Appellants' brief, page 155, predicates as facts on which to build the foundation for all the future

argument, that the early vicissitudes of the property were known; that Noyes bought the property with his own funds; that there was publicity given to the purchase, to the leading stockholders directly at the time of its acquisition, and to all stockholders by the annual report of 1913. There never was a report to any stockholder, nor any annual report sent to the eastern stockholders, showing that Noyes paid $24,009.33 for the property, or any other sum. This ultimate fact was finally developed by Wm. S. Noyes when he had no other recourse, and it was forced from his lips by the complainants' efforts.

It is also claimed that Wm. S. Noyes offered to convey Section 5, and that the company could not purchase the same because of financial disability. None of these grounds are well taken, as the facts in the case disclose: In the first place, the corporation was in good financial condition, as we have heretofore shown. Wm. S. Noyes was not in good financial condition,—he had no credit except as it was developed through the company associations and through its support. The parties from whom he borrowed the money were expectant participants in continued company business and profits derived therefrom. The information Noyes had was only made possible through his company connections and years of service. He alone knew the conditions. He was receiving a liberal salary. Everything acquired by him in addition to his salary under these conditions belonged to his principal, the Presidio Mining Company. His governing purpose (brief p. 156)

was not the rehabilitation of the company, but was the laying of foundation for his own enrichment to the detriment of the stockholders of the company. "That he violated no duty to the corporation (p. 163) and could likewise enter into independent competitive business" is not the rule under the circumstances.

In dealings between the corporation and its principal director, such as here existed, with Wm. S. Noyes on both sides of a contract between himself as the owner of Section 5 leasing to the company, which he controlled (for he dominated Osborn and controlled the acts of Mrs. Willis), and then after making this lease between himself and the corporation he obtained the bonus resolution of $45,000, the primary object of which was to guarantee the necessary funds with which to repay his promissory notes given, and control the corporation stock through the concealment of the Osborn shortages of $10,689.75, which defendants finally divulged, and then subsequently in November of said year again making a contract betwen himself and the corporation through his biddable and pliant board of directors, whereby he laid the foundation for the pernicious system of the false assaying and the dollar differential, the remedy applied by the interlocutory decree and the order appointing a receiver was an absolute necessity.

In the case of Cowell v. McMillin, 177 Fed. 25, so much relied on by appellants, the decision of the trial court was in favor of the defendants. The

appellate court affirmed the decision. A reading of said case will disclose that Cowell and McMillin were competitors in the lime business; that McMillin dealt with disinterested trustees, who acted fairly and were business men of capacity and standing in the community. The value of the patent machine to make barrels was often discussed by an agent of the inventors with all the trustees. Said agent spent two months in Roche Harbor where the corporation officials resided. The matters were discussed by the directors among themselves a number of times with McMillin between September, 1890, and March, 1891, a period of six months. McMillin said he did not want to take up the invention for he was the president of the corporation, and if it should prove to be a good thing it ought to belong to the company. Whatever was to be done he stated should have been done by the company. The directors decided that McMillin could take the invention (36) and experiment with it, for its value was not determined as to its adaptability in handling Washington timber. That the first machine was not a success; that in September, 1892, fire destroyed the stave mill and the machine. Then McMillin ordered a new machine built. The trustees were familiar with all these negotiations. On page (37) we find it stated that time and again McMillin urged the company to take up the machine. He talked of his relations with the company and of his delicate position in the matter. Cartwright, the bookkeeper, testified that McMillin was very anxious for the company to take over the machine. It was held there was no concealment

by McMillin. It also appears that McMillin owned a large block of the stock of the corporation, and finally bought out some of the others, paying them real money. The court holds (p. 38) that the purchase of this stock was immaterial unless the facts and circumstances surrounding such purchase tended in some way to show fraud on McMillin's part, or conspiracy between the associate directors and McMillin to serve McMillin at the expense of the corporation, and complainant's interest when the contract was made.

After discussing the accounting features of the case the court holds (p. 39):

> "That McMillin acquired the title to the barrel machine in good faith, with the knowledge and consent of the board of directors, and after the board knew of the merits of the machine and had expressly refused to become interested in it; that there was no concealment from the board of directors on McMillin's part; that McMillin made a lease of the property and the contract for supplying barrels in good faith, and that the contract when entered into was not unreasonable, unfair or illegal."

The court then announces the very rule we are contending for in this case:

> "We would not, to the slightest extent, depart from the salutary rule that directors and other officers of a corporation, occupying a fiduciary relation towards a corporation, are not permitted to assume positions which will bring their private interests into conflict with their duties to act solely in the interests of the corporation; nor would we argue upon the wisdom as well as the morality of the doctrine that

where a corporation has made a contract with one of its directors, or a contract wherein one of its directors is personally interested and the interested director has taken part in the making of the contract, the corporation may elect to avoid the agreement so made, even though it is in fact free from fraud. But these principles are not those which control this present case, for here the transaction, when viewed as a whole and in its several parts, between the director and his company, was entirely free from fraud, and the contract was unanimously authorized by a board of disinterested persons, the interested director not voting."

After further discussion the court states (40):

"We may say, too, our examination has been had under the conviction that the transactions involved should be very closely scrutinized, and that it has devolved upon McMillin to show that his conduct was honest, candid, and free from wrong."

Speaking of the votes of directors by which increases of salary were given McMillin, the court holds (p. 41):

"We find no satisfactory fact upon which to base a conclusion that the trustees who voted to increase McMillin's salary acted either corruptly or under a false motive. They were men of business standing, holding very responsible positions in mercantile affairs, and it is not unreasonable to believe that their action as directors was prompted by no course other than careful regard for what seemed to them to be the interests of the corporation."

As to concealment from the minority stockholders (p. 41) it will be seen that in January, 1895, com-

plainant knew of the lease made and its contents. In 1903 he employed an expert and five months were consumed in going over the corporation affairs. It also appears (p. 42) that another lease was made to run to 1908. Ratification of the lease by stockholders took place after all these facts were known and proper notice given. Naturally the decree of the lower court was sustained.

We submit that the facts of this decision speak for themselves, without extended argument. In the McMillin case no fraud was found by either the trial court or by the appellate court on complainant's appeal. In the instant suit we have fraud found by the trial court on all grounds complained of.

The directors were the thief Osborn, the dummy Peat, who had signed Osborn's embezzling checks; B. S. Noyes, the attorney at law, the confessed errand boy of Wm. S. Noyes and chief assistant in concealing the Osborn shortages, and who likewise helped himself to the Osborn and Willis stock to the extent of over 10,000 shares, and the echo, Miss Doherty, a pliant tool in their hands. This was the board of directors which distinguishes their actions from those of the board of directors in the McMillin case. Nevertheless, a number of pages are thereafter devoted to a discussion of this case, in an effort to bolster up the defendants' position. Who could protect the rights of the Presidio Mining Company? Yet on page 189, brief, we find asserted that there is no proof here that the Silver

Hill stockholders would have dealt with the Presidio Mining Company; that the sale was a cash transaction, and that the Presidio Mining Company had neither cash nor credit. Nothing could be more misleading than this statement under the facts of this case for the only credit, standing and reputation existing at this very time was that of the Presidio Mining Company. It had no debts. It had $51,000 of liquid assets. It had a plant and equipment and it had a good mine. Wm. S. Noyes had 1382 shares of the stock, and no assets and no credit of his own. All that he had was derivative from his connections with the Presidio Mining Company.

The claim alleged to have been asserted by complainants, that Mr. Noyes should have purchased Section 5 with his own funds, under the circumstances likewise predicates a false premise. The citation of Teller v. Tonopah R. R. Co., 155 Fed. 482, 483, 484 (discussed on pages 199, 200, brief), is not applicable to the facts in this case. The discussion in said case is construed by appellants in a manner to mislead the court without a careful examination of said case. The principles involved have been distorted to fit said case to the facts in the instant suit. An analysis of that case will show, first, the syndicate in the Teller case put up real money; there were 32 individuals composing said syndicate; ten of whom were directors in the defendant corporation, and they held less than a majority of the stock; second, the majority stock-

holders of defendant corporation ratified the deal, complainant being the only one objecting; third, it was of great benefit to the defendant; fourth, the complainant expected the directors who had means to put up their money for his benefit; fifth, the transactions were all fair and open. There is a very great difference between these features of the case and the construction sought to be placed upon it by appellants.

Wm. S. Noyes bought Section 5 on the credit, reputation, and financial standing of Presidio Mining Company. He could not have bought Section 5 on his own credit, with his own funds, for he had neither as an individual, but as the sole confidential agent of the Presidio Mining Company he could get both.

The argument that Section 5 was not immune from characteristic conjecturalities of mining (brief p. 203) is true to a certain extent, so far as applied to mining generally. But Section 8 had been operating continuously for 29 years, under the control of Wm. S. Noyes, familiar with all its ramifications and underground conditions, and also familiar with Section 5 adjoining. The examination in December, 1912, of said property, after tying up the Silver Hill stock, made by both Gleim and Noyes, thoroughly satisfied both said last named as the officials of the company what the possibilities with said Section 5 were in conjunction with the equipped mine and mill of the Presidio Mining Company. There was no conjecture about it, for

they had a body of ore worth from $100,000 to $400,000 (568, 686). With a plant to treat the same the results were certain. There was nothing conjectural about it.

The testimony of Wm. S. Noyes evidences a very substantial body of ore exposed in Section 5, which he described as follows:

> "I found Section 5 just as I had left it in 1897, when I closed it down for the Cibolo Creek Mill and Mining Company, with the exception that the engineers that had been examining it for the New York people had run two drifts and opened up a new pocket of ore that had not existed when I left the mine, or was not known when I was last in the mine. We ascertained the possible extent of that body of ore as much as we could. Two drifts or crosscuts were run at angles with each other like an 'X' and a winze sunk about 30 feet and an upraise into a place up on the level above, so that the exposure of ore was about 80 feet in the drift, and I should say, guessing roughly, 50 or 60 in the crosscut. Ore showed 30 feet down that winze. From that as I always have to do in these pocket deposits I made a rough guess that it might contain anywhere from 10,000 to 20,000 tons of ore, depending upon the outline of the ore body, which in these pockets of limestone is very largely conjectural" (686).

In a report to Mr. Boyd, February 16, 1907, he wrote:

> "Experience has shown in working this mine that it has always yielded two or more times as much ore as could be actually measured. * * * I want it clearly understood that I am expressing an opinion based on twenty-two years' experience with the mine" (662).

Mr. Noyes knew what could be done and that Section 5 was a valuable property. He made no such disclosure of facts to the stockholders, in the premises, as the law requires of one standing in the confidential relation he did to his principal, the corporation.

In his dealings with the company relative to Section 5 defendants next urge that Wm. S. Noyes was entitled to make a fair profit under all the circumstances. Had Wm. S. Noyes done his duty he would have secured the property for the corporation, and not manipulated the control of both Presidio Mining Company and Section 5 into his own hands; for he installed a cyanide plant on the company's credit, reduced the operating cost approximately one-half, but arranged the transactions, so far as division of income was concerned, so that the losses from Section 8 were sufficient under the system devised to absorb all the profits which the company was alleged to make from Section 5, so that all profits flowed into his pockets, with no possible relief to the corporation stockholders other than those whom he would favor.

It is true that no obligation rests upon a stockholder or director to make a disclosure of his private transactions (Br. 209), yet the facts of this case show that there was secrecy as to all vital matters connected with the acquisition, the purchase price, and the manipulations of the property by Noyes. Page 212 of the brief enters into a discussion of certain absurd extra-territorial excur-

sions to convey books and records to non-resident stockholders of the corporation for their inspection, and further states on said page that by reading the minutes of the meetings any stockholder could fully understand the whole situation and Noyes' relation to Section 5. The minutes of this meeting on January 29, 1913 (577), were prepared on the 28th of January by B. S. Noyes, the attorney, on the assumption that director Fish would be absent, and whom both Gardiner and Herger testified was present. This was the meeting in which the first lease was adopted, showing the method of preparation for succeeding events, which the brief alleges could be fully ascertained by reading the minutes. Other misstatements occur which are hereafter referred to, not only in this instance but in others connected with said minutes.

The bonus resolution of February 15, 1913, is referred to in the following language by the trial court (422):

> "This so-called bonus resolution, I think, was as bald a fraud as has ever fallen under my observation. It was without any character of fundamental right in its inception. And, of course, the finding being that the title to this Section 5 should really be in this corporation, all the benefits that accrued to Wm. S. Noyes from that transaction, as well as the subsequent lease which I hold likewise to be void, must be accounted for."

Pages 213 to 215 of the brief discuss the duties of foreign residents to come and see the corporation books of the company. The records of the corpo-

ration only disclose what Wm. S. Noyes desired. We defy anyone to find the Osborn shortage mentioned in any of the records or mentioned in any of the financial books or records of the corporation up to the time of the commencement of this litigation. The annual reports are discussed, commencing with page 219 Br. The annual report of October, 1913 (Comp. Ex. 17) on page 4 sets out the following (629):

> "Early in 1913 Section 5 adjoining the Presidio Mine was on the market for sale. This company being unable to buy it having exhausted its credit on the new installations before mentioned, it was purchased by the writer and an agreement made whereby this company will work it on terms of a division of the net, and perhaps will purchase the same later on. Late developments in Section 5 indicate that it will be a source of large revenue."

It will be noted that this report says that Section 5 was on the market early in 1913, when as a matter of fact Wm. S. Noyes had been arranging its purchase since November of 1912 and actually acquired it the first month of 1913. He had discussed it with Osborn in November, 1912. He also had conversations with Mrs. Willis (682-3). He obtained the first option on Silver Hill stock about December 20, 1912 (685). Where is there any information given to a distant stockholder which would in any way inform him as to what had happened? What could the stockholder know of the $25,034.10 already paid to Noyes on Section 5 account, when the report puts it that the company

"will" work Section 5 on terms of a division of the net? What could he know of the definite value of Section 5 by such information as *"Late* developments in Section 5 indicate that it *will* be a source of large revenue"?

Then in October of said year the change in date of annual meeting was made to February of each year, so that no report would be sent until 1915. This report for 1914 reached the stockholders about the first of April, 1915; so that no information was obtained or could be obtained by a distant stockholder trusting in the company management and integrity of its officials for a period of time from October, 1913, until nearly a year and a half, and which report showed, when received, an indebtedness of the corporation for the first time in many years, in the words following (Comp. Ex. 18, p. 2):

> "In addition to these ordinary debts, there is due the writer (Wm. S. Noyes), under the contract for the operation of Section 5, $42,822.40 but this is not urgent, as are the other debts. As mentioned in the report for 1913, I bought Section 5 to work in conjunction with the Presidio; it was offered to the Presidio Mining Company which was unable to buy it, and after that the contract to work it on shares was made."

The argument following (p. 219) solemnly asserts:

> "This solitary non-resident stockholder stood by, looked on, and did nothing effectual until he commenced this suit on July 26, 1915."

We find no complaint made that since July, 1915, nothing effectual has been done, for the history of this litigation shows such an upheaval that there is still gradually coming to light the history of devious practices not only since 1913, but for many years prior thereto.

Pages 221 to 228 of the brief are consumed with the statement that the company had Section 5 offered to it, but could not purchase. Noyes claims that it was offered to Mrs. Willis and Osborn; their answers were colored by the resultant attitude of mind of said parties influenced by the actions of Wm. S. Noyes.

The expenses (pp. 228-230 brief) were no mere trifles, and we shall touch upon this element of the case further on in our argument.

At pages 230 to 244 it is asserted the corporation was financially unable to acquire Section 5. We have already touched upon this matter, and will develop our answer to said statements more fully hereafter.

Pages 244 to 281 deal with the assertion that the complainants failed to establish that Section 5 was purchased with funds derived from the Presidio Mining Company. We answer said contentions fully in the subsequent pages of our brief, but desire to call attention to one or two misleading assertions. This portion of the transaction is not an isolated event, but was all a part of the general scheme of fraud conceived in sin and perpetrated in iniquity. Much emphasis is placed upon the fact

that the notes were paid in 1913, but it will be shown that they were paid by renewals and by other borrowings, which renewals and subsequent notes were not paid until long after Noyes had secured the funds from the corporation to enable him so to do. On page 50 it is asserted that there is no evidence of the payments to the Noyes note accounts; but there are vouchers showing the payments and cash book entries relating to the moneys drawn by Noyes from the company; and it likewise is a fact that in December, 1912, Noyes had no funds of his own, and 1382 shares. In 1914, however, the records show he loaned the company $10,000. When a man with no means at the commencement of a series of operations such as here revealed suddenly appears in affluent circumstances within a very short period of time, and he has not shown any other source of revenue, such as Noyes did not show, it will be presumed that his sudden accretions of wealth, such as are divulged in this case are a part of the general scheme of fraud, and the possessor of such sudden affluence will be held to account.

See U. S. v. Carter, 217 U. S. 301.

It is argued in the brief, p. 281, that at the time of the acquisition of Section 5 the Presidio Mining Company had no right, title, interest, estate, or expectancy in that section. The answer to this assertion is that it was acquired by the confidential agent under a liberal salary, who betrayed and used his knowledge of the property gained through the company service; he concealed the real facts from

the corporation, his principal, and manipulated affairs within the body corporate so that he dominated the principal stockholders and controlled them, arranged a biddable board of directors who reflected his views and whose complexion was that of his own personality; he took the expenses required in purchasing the property and the sustaining means and credit of the corporation to back his own plans and support his own program, and derived the very funds with which he in effect paid for the property through the manipulations originated, planned, and carried out by himself. The control of the corporation through the Osborn shortage, was the vehicle used through which the property was acquired; then its affairs were so manipulated that all its available funds flowed into the pockets of Noyes, and the company stockholders obtained nothing. Under the plans he had developed, with the pernicious November 19, 1913, contract, he has piled up a huge claim against the company. Then it is asserted (pp. 295, 296) that Section 8 had in no way been impaired by the purchase of Section 5 by Noyes, but that the result of the transaction as a whole has been favorable to the Presidio Mining Company. The logic of the brief fails.

Immediately following, however, on page 296, it is admitted in the argument that the facts and circumstances should be regarded cumulatively; that the evidence should be considered not by fragments, but in its entirety and as a whole,—in which state-

ment we concur as a rule of law, but not in the sense in which it is attempted to be used in the brief.

It is next argued (p. 297) that no trust can be impressed on Section 5 because of the proximity of that section to the company property. In this portion of the argument emphasis is again laid upon the pretended fact that the company was hopelessly involved and rapidly drifting into bankruptcy. In the amended and supplemental complaints the averments are that Wm. S. Noyes as the sole confidential agent of the company alone knowing the facts, wrongfully took advantage of what he knew, and the question of proximity of the property becomes material only in so far as it was known to be advantageous provided the high grade ores in it could be used to sweeten up the large reserves of low grade ores in Section 8 (Gleim test. 569, 572).

On the question of resulting trust (p. 300): We never have asserted any resulting trust, neither has there been any change of front by complainants, as asserted on page 303 of said brief. The inability of defendants to interpret the original and amended bills of complaint in any other way than as asserting a resulting trust does not help the situation, for we apprehend that the complaints set forth the facts. Our theory may be deduced from the pleadings both the amended and the supplemental bill, and from them with the answers the issues before the court were made. We have heretofore adverted to this subject in our general answer to the brief.

The assertion on page 306 that there was no constructive trust as to Section 5 we believe is answered by the evidence in the case and the finding of the lower court on said subject.

We have analyzed the brief of appellants on this subject because the question of Section 5 acquisition by Wm. S. Noyes becomes a very vital factor in this case. It is one of the principal elements involved in this chain of fraud.

We now present affirmatively a connected story showing the actual facts in logical order, disclosing the grounds on which may be predicated and premised true deductions, and to which the rules of law we shall announce are applicable. The application of said rules decisively supports the decision of the trial court and the position of the complainants in this suit.

Wm. S. Noyes has been connected with the company since its incorporation. He had sole and exclusive charge of the company's mining operations in Texas since 1883 (Par. 22 of answer, 202). He lived at the mine up to 1901, then in Oakland since, but controlled all operations of the company subsequent to his removal from Shafter. In November, 1912, he had been superintendent 29 years. He was the only person thoroughly familiar with Sections 5 and 8. In November, 1912, E. M. Gleim, the direct agent of Noyes in Shafter operating the mine, wrote Wm. S. Noyes that Section 5 was for sale (565, 682). At that time E. M. Gleim was thoroughly familiar with recent developments in Section 5 by engineers

exploring and developing it (565). Noyes immediately went to Oregon to negotiate a loan of $10,000 from Benton Bowers to assist in the purchase of Section 5. He returned the early part of December, 1912. On December 12, 1912, L. Osborn, the largest stockholder, transferred to Wm. S. Noyes 28,607 shares of his stock. On December 16, 1912, Wm. S. Noyes went to Marfa, Texas. Gleim met Noyes at Marfa. Noyes immediately arranged for a loan of $10,000 from the Marfa National Bank. Noyes and Gleim travelled around the country and secured options on all but 4 shares of the stock of the Silver Hill Mill & Mining Company, then owning Section 5. Harry Young, half owner, optioned his stock to Noyes for $10,000. Wm. S. Noyes and E. M. Gleim then went to the mine, 45 miles distant from Marfa. Upon arrival at the mine Noyes and Gleim together went into Section 5 and examined the ore bodies (686). They ascertained that there were from 10,000 to 20,000 tons available in the new body alone uncovered by the Lewisohn engineers. Assays made showed values of 45 ounces of silver to the ton. The ore body was estimated to be worth from $100,000 to $400,000 (568). Noyes testified that from his experience the mine always produced two or more times as much ore as could be measured (662). After ascertaining the values in Section 5, arrangements were made to take up options and extract ores. Noyes secured the loans for which he had previously arranged, to wit, $10,000 from Benton Bowers in Ashland, Oregon, one of the company's largest contractors whose contracts had been

awarded him by Wm. S. Noyes; $10,000 from the Marfa National Bank, secured by the Presidio Mining Company stock Noyes had taken from Osborn in December, this loan also superinduced by the transfer of the company's bank account from the San Antonio Bank to said Marfa Bank, with a business amounting to at least $250,000 per annum (Comp. Ex. 19, p. 6); and the $5,000 note to Harry Young, the Shafter storekeeper, whose prosperity would be assured by the favors of Wm. S. Noyes as agent of the company. Meanwhile, J. W. Kniffin, a milling engineer, had been sent for to design the cyanide plant. He arrived at Shafter on December 24, 1912. Kniffin was instructed to prepare plans for the cyanide installation. He finished his plans in the early part of January, 1913. On the 19th of January, 1913, Noyes claims he discovered the Osborn shortage (685). Kniffin testified he was informed by Gleim the early part of January that Osborn was short in his accounts, and to hold off on the cyanide installation until financial matters were readjusted (949). On the 19th Kniffin was instructed to commence work; on the 20th work began. The same day Noyes and Gleim went to El Paso to buy machinery (958). On the 23d Noyes wrote the Willis letter (537, 540).

During this period the testimony of both Noyes and Gleim evidences an understanding that was evidently had and given to others, that this Section 5 was to be obtained for the corporation. (W. S. Noyes' answer, 213, 215); the Willis letter (537-

540); test. W. S. Noyes (724, 683, 765) that he had offered the property to the corporation. E. M. Gleim testified that during the time when they were securing options and examining Section 5 he told Noyes: "We ought to get the property" (565).

When questioned as to whom he meant, he said:

> "Mr. Noyes and myself, as representatives of the Presidio Mining Company" (565).

He testified also:

> "We went to the bank" and the cashier "told us we could get the money" (566).
>
> "As soon as we found we could get control of the stock * * * we immediately went back to Shafter. We went into Section 5" (567).
>
> "It looked very favorable to us" (568).
>
> "It was high grade ore" (569).
>
> "That body of high grade ore we found would have been of no value by itself. Its main value lay in the fact that we could use it to grade up the low grade material, which we knew was standing in the mine" (569).
>
> "It had some high grade ore, which was something we had to have, having the low grade bodies we did have" (572).
>
> "It was very doubtful if there was enough ore in Section 5 to justify a metallurgical plant. *That is why the property was turned down by the people who had previously examined it*" (569).

Noyes claims that in February he offered Section 5 to the Presidio Mining Company, and that they refused it (765), admitting that his offer was a "colloquial" one, and not formally made to the directors.

Wm. S. Noyes testified (690):

"The company could have that mine at cost if they wanted it. By that mine I refer to Section 5."

"That the company could take the mine any time they were able to off my hands at its cost, or if I had got to stand under all of this, I thought it was only fair that I should have some compensation for it."

"It was rather a colloquial offer. They were simply told it was open to the company if they wanted to take it" (765).

But notice the evasion in the following:

"The company took no action—that is to say, the company could not do it; it had no money. In November, the minutes recite that it had been offered to them; it was offered verbally at that meeting" (765).

Who controlled the actions of these directors, Osborn, Peat, Miss Doherty and B. S. Noyes? Were they independent free agents?

Miss Doherty testified:

"He" (W. S. Noyes) "said whenever the company was able to take it for what he paid for it, why, the company could have it if they wanted to" (814).

"Q. At any of the different meetings that you have testified to, was there anything said by William S. Noyes as to the terms upon which the Presidio Mining Company might obtain from him Section 5?

A. I think he said, pay him what he had paid for it; they could buy it from him whenever they wanted it, or words to that effect" (817).

B. S. Noyes testified:

> "Mr. Noyes stated" (referring to February 15, 1913, meeting) "that the company could have Section 5 at cost then or thereafter, and it was informally decided prior to the date of that meeting that the company could not take it, and the suggestion had been made" (by whom?) "and assented to by all parties, that as long as Mr. Noyes carried it the company would work the ore and settle with him on a basis of one-half the net" (909).

The significance of the last quoted testimony clearly sets forth that so long as Mr. Noyes carried Section 5 the company would work the ore.

Under the November 19, 1913, contract provision was made for a method by which this company never could quite get enough money to buy the property, for Noyes would get it all,—and this result took place.

Captain Overton testified (586):

> "I tried to find out from Mr. Osborn how much Section 5 had been offered to the Presidio Mining Company for, and when. I told him I could find no records for that. He told me he did not know when the offer was made, or for how much, I would have to see Mr. Noyes about that."

> "Mr. Peat had conversation with me relative to these matters, and told me he did not know when Section 5 was offered to the Presidio Mining Company, nor for how much. I could not find out. I was trying to find out how much Section 5 had cost and could not find out from either Mr. Osborn or Mr. Peat. Mr. Osborn told me that there was no record of that unless it might be a memorandum in

> Mr. Noyes' own office. I looked over the records thoroughly; I did not find anything. I found nothing in the minutes at all, where it says, how much it was offered for, or where it was offered; it simply says in the minutes of November 19th, that it had been offered, but there is no record where this is found. I started to investigate both here and in Texas through friends to try to find out mainly how much Section 5 cost and what it sold for. I learned through a business relation that $25,000 was the price. I went practically through all the records of the company'' (587).

We have here a conflict of testimony. Wm. S. Noyes, B. S. Noyes and Miss Doherty all say that Wm. S. Noyes offered the property to the company, to be taken by it at any time the company saw fit to do so, at its purchase price to him.

As to his offering the property to the company, two of the defendants, Peat and Osborn, stated to Captain Overton that they knew nothing about an offer to the company, or when it was offered, if at all.

We have already adverted to the fact that all payments and expenses in connection with these negotiations were paid by the corporation, covering those of Noyes and Gleim, the assaying and sampling, the sending of telegrams for which the company was never reimbursed by Noyes. Vouchers 14, 18 and 23 show company expenditures of $433.55 traveling expenses Noyes and Gleim incurred on account of cyanide plant and purchase of Section 5 (764). The assaying was done by paid employes of the Presidio Mining Co. Voucher 19

shows $22.05 spent for telegrams (764). The company never was reimbursed for any part of said sums. None of the letters or telegrams sent by Noyes from Texas to San Francisco can be found (766). All have been destroyed or removed (746, 649, 524).

The Silver Hill Mill & Mining Company had 1500 shares. The following is a tabulation showing the dates, parties, shares and amounts paid, aggregating $24,009.33 (508):

Date Paid		No. Shares	Amount
1913			
Jan. 25.	H. B. Young	750	$10,000.00
" "	Mrs. Colquitt	281	3,746.66
" "	W. H. Colquitt	90	1,200.00
" "	T. C. Crosson	93	1,240.00
" 31.	J. C. Midkiff	30	400.00
Mar. 7.	W. S. Lane	252	4,300.00
Apr. 1.	H. M. Daugherty	4	175.00
		1500	$21,061.66
Paid Frank Russell March 20th "for services in negotiating deal"			500.00
Extra payments as per stipulation (693, 683)			2,447.67
Total for Section			$24,009.33

This amount of $24,009.33 was all borrowed money, of which not a dollar was repaid until he had drawn a greater sum from the company, as follows:

684 903 532	Aug. 19, 1913. Made first payment to Marfa Bank by borrowing from B. S. Noyes. Before this date Noyes had received on account Section 5	$18,076.10
684 532	Oct. 1, 1913. Paid Bowers $10,000 and interest of $584.15. This is the first actual money he paid out. By this date Noyes had received an additional $6958; $3000 of which he took out this very day, making	25,034.10
684-685 532 533	Nov. 26, 1913. Noyes paid Harry Young $5000 by again borrowing from Benton Bowers. By this date he had received	26,503.60
685	Sep. 25, 1915. Noyes paid Bowers money borrowed Nov. 26, 1913 ($5,000). This is the second time he actually paid out money. By this date he had received	57,129.60
684 685 903	Oct. 4, 1915.* Paid second loan from Marfa Bank. This is the third time he paid out money	
685	Nov. 16, 1915. Paid renewals of loan from B. S. Noyes. The day before this payment (Nov. 15, 1915), he received an additional $3650, making a total he had received in cash before paying $24,009.33 for Sec. 5,	60,779.60
524	Dec. 1, 1915. Received $2556.60 Total	63,336.20

* This date is given in Noyes' testimony as October 4, no year, but it must mean 1915, as is shown by the statement of Noyes that in March, 1915, he still had $15,000 of loans out, helping to carry Section 5 (728).

The foregoing synopsis and reference to the pages of the record evidences the history of the financial transactions occurring during the period subsequent to the obtaining of title to Section 5 by Wm. S. Noyes on May 26, 1913. The amounts of money received by Wm. S. Noyes are all entered in the cash books of the company which were admitted in evidence in the case during the trial. Should any question be raised by appellants about the amounts of payments to Wm. S. Noyes, we respectfully urge that the original books of record introduced in evidence be submitted to the court to verify the various payments made to Noyes. The record shows that with two claimed exceptions all the moneys paid by Wm. S. Noyes for Section 5 were secured by him through promissory notes given to interested parties who were beneficiaries under his program. The only two claimed exceptions are the payments alleged to have been made from moneys received from New York City through Herzog & Glazier, and a sister of Wm. S. Noyes. The payment made to Bowers October 1, 1913, it is asserted was partially made up with $6000 drawn from Herzog & Glazier, New York, through J. Barth & Co. in San Francisco (685). Noyes testified that this account with Herzog & Glazier was held sometimes in cash and sometimes in stocks, the results of speculation. That he should have $6000 to draw on is no indication that he did not deposit there in New York some of the very moneys paid him from the company here. He was speculating, and therefore

moneys were moving in and out of this account. From this liquid account in New York he drew $6000 to pay part of his note to Benton Bowers, the balance coming from his bank account here. This very day Noyes drew from the treasury $3000, making a claimed total of $25,034.10 drawn by him to that date, of which $11,000 was used to get control of the company. This total of $25,034.10 is subject, however, to the deduction on September 6th of $3500 which he falsely testified he had received knowing at the time that the receipt evidencing said transaction was a fictitious document.

Concerning the second item, as to the property his sister had sold for him, nothing was said as to the amount received through the transaction, and nothing was introduced in the way of documentary proof by Noyes in support of his statements. Other than these two amounts, which are both uncertain, the one being uncertain as to the source of the money not coming from the Presidio Mining Company, and the other not being shown, the entire amounts requisite to pay for Section 5 were secured by him on promissory notes given to interested parties, the times of payment being extended by borrowing from one to pay another, and ultimately paid after Noyes, a man without ready money of his own in December, 1912, was able to draw the total sum of approximately $60,779.60, less the sum of $3500, a net amount of $57,279.60, from the Presidio Mining Company, the alleged tottering and bankrupt concern "steeped in impecuniosity to the very lips" (appellants' brief, p. 302).

Appellants' brief touching the foregoing matters urges most insistently that we must trace the trust funds from the corporation into the pockets of Wm. S. Noyes, and through the pockets of Noyes into the hands of each one of these different parties who received moneys on Section 5 purchase account, and that unless this be done complainants' case must fail. We do not so construe the law. In addition, they seek to construe in connection with this line of argument and logic that the "whole contention" of complainants is alleged to be that Section 5 was bought with borrowed money, and that the notes given to purchase the same were not paid for a year or a year and a half thereafter. Can it be said under the circumstances, considering all the facts in the case, that a reasonable deduction can be made from the statement so often quoted in appellants' brief, that the "whole contention" with regard to the acquisition of Section 5 was to the manner of its purchase, when the evidence clearly shows that the remark was made during the trial when only the purchase price was under discussion?

We have clearly shown that Wm. S. Noyes, B. S. Noyes, and Miss Doherty testified that Section 5 had been offered to the company to be acquired by it whenever it desired it or could take it from Wm. S. Noyes at the price paid by him. Why arrange matters through his company control so that it could never take it off his hands?

The burden of proof as to the fairness of the transactions surrounding Section 5, its acquisition by Noyes, and the subsequent management of the company, is to be considered in the light of the circumstances and facts existing in the case, and under the rule the burden is upon Wm. S. Noyes, and all doubts must be resolved against him. He was the confidential agent of the company in a fiduciary relation.

Equity does nothing by halves, but administers complete justice when wrong has been done, and under this rule full restitution is required by Wm. S. Noyes, not only by turning over the property to the corporation on payment of its purchase price, but by accounting for all the proceeds derived therefrom under the different contracts made by him.

The trial court in touching on this same matter expressed itself thus (oral opinion, 419):

> "The main matter for consideration in the case—the acquision in the name of William S. Noyes of Section 5— was enabled to be had by virtue of his getting control of the company and its board of directors; and I find that while the transaction was not carried out in that form it was nevertheless an acquisition of that property by funds of this company in fact; that Noyes alone, aside from his superintendent Gleim, was, of all the people connected with the company, fully cognizant of the character of Section 5 and its value; that while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face bear the impress of having been procured by funds other than those of the company, nevertheless he knew at the

time that he had potential control of this company and that he could procure the means or funds from the company with which to pay for this land; and that he pursued a course which brought that result about. The incidental transaction referred to as the bonus resolution was with that object in view; first, to secure the means by which to manipulate the control of the Osborne stock, and, second, the passing of that resolution also brought about a situation which enabled him to secure the funds of the company; that and the subsequent leasing of Section 5 to the corporation defendant enabled him to procure the means with which to pay every cent of the consideration paid for Section 5.

Under these circumstances, I am satisfied that equity, which looks to the substance and ignores the mere form in which a transaction is cast, will hold that property to be in equity the property of the Presidio Mining Company."

The oral opinion (422) also designated the bonus resolution as being as bald a fraud as had ever fallen under the observation of the court, and held:

"the finding being that the title to this Section 5 should really be in this corporation, all the benefits that accrued to Mr. William S. Noyes from that transaction, as well as the subsequent lease which I hold likewise to be void, must be accounted for."

Summing up the evidence touching on the acquisition of Section 5, we believe it is clear from the evidence that the following is fairly deducible:

1. Wm. S. Noyes was the confidential agent of the company, on whom all depended for information at all times during the inception of his plan for and carrying out of the acquisition of Section

5 by himself, together with the subsequent conduct and management of said property.

2. Wm. S. Noyes' credit on which he secured the money to purchase Section 5 was made available through the company backing due to his position with the corporation.

3. The money used in purchasing said property came from interested parties who were the company's beneficiaries:

(a) Benton Bowers, the contractor hauling freight and furnishing wood to the company;

(b) The Marfa National Bank, which benefitted by the change in the bank account, its $10,000 loan to Noyes being secured by Presidio Mining Company stock and the endorsement of William Cleveland, its director, anxious to get business for the bank;

(c) Harry Young, the Shafter storekeeper, who would participate in the continued prosperity of the company.

4. Wm. S. Noyes had no ready money of his own in December, 1912, and but 1382 shares of the capital stock of the company.

5. Wm. S. Noyes alone knew the possibilities both of Section 5 and Section 8. He had operated both sections.

6. He obtained Section 5 ostensibly for the company, as he himself, his brother, and Miss

Doherty testified; that the company could have said section at any time it wanted the property on paying its original purchase price to him. The testimony of Gleim shows how necessary it was for the purpose of using the rich ores in said section to sweeten up the lower grade ores from Section 8.

7. He knew he could not work the property himself, but the company could. That in order to control the means he must control the primary source of the means, viz., the Presidio Mining Company.

8. He knew a long life was ahead of the company if it acquired Section 5; that the ores were very necessary to the property in continuing said long life.

9. The Presidio Mining Company paid all his own and Gleim's expenses while securing the options on the stock, while acquiring the same and closing the deal, even to the telegrams concerning the acquisition of said Section 5.

10. The Presidio Mining Company paid the salaries of all the men actually employed, for assaying, sampling, investigating and reporting on the property.

11. The company paid all the bills for equipment of Section 5, including the tramway installed to facilitate its extraction of ores.

12. The moneys of the corporation were ultimately used to repay the very notes given by Wm. S. Noyes.

13. Wm. S. Noyes never obligated himself to pay any of the corporation bills incurred through these transactions nor the improvements made to the company's property, to facilitate said extraction of ores.

14. All information Osborn or Mrs. Willis had in the premises was what Wm. S. Noyes desired they should have. The actions of both Osborn and Mrs. Willis were the reflected desires of Wm. S. Noyes.

15. The price of silver in November and December, 1912, was higher than for many years.

16. No large stockholder other than these two, Osborn and Mrs. Willis, were approached on the subject, but active concealment took the place of that frankness and openness required under the law touching these transactions.

17. He manipulated the entire transactions through the Osborn control, gained through the knowledge of Osborn's shortage, and playing upon Mrs. Willis' mind, then planned the lease for 50 cents per ton royalty, the bonus resolution for $45,000 for getting the same, $11,000 "forthwith" used to conceal the Osborn shortage, and then intended to be left free to garner all the gains by means of the pernicious contract of November 19, 1913, which provides for the false assaying system and the dollar differential.

18. From a man with no ready money in December, 1912, he was able with the corporate resources,

to appropriate to himself all its assets to secure the funds to repay his notes, and emerge with every corporate asset in his hands, plant, equipment, credit, and finally its entire surplus cash, all of which was a part of his scheme to enrich himself, to the loss and detriment of the company.

19. The burden of proof is on Noyes to show the fairness of all these transactions.

The law applicable is stated in Angle v. Chicago etc. Ry. Co., 151 U. S. 26, as follows:

> "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, *but in any other unconscientious* manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

The rule is likewise discussed in

Steinbeck v. Bon Homme M. Co., 152 Fed. Rep. 338;

Trice v. Comstock, 121 Fed. 622;

Pomeroy's Eq. Jurisprudence, 3rd Ed., Vol. 3, Sec. 1053;

39 Cyc., pp. 27, 182.

See also authorities on burden of proof, pages 66-70, brief.

The rule concerning the principles of law applicable to Wm. S. Noyes under these conditions is

fully expressed by Mr. Mechem in his work on Agency, Vol. 1, 2nd ed. 1914:

> "Sec. 1188. Loyalty to his trust is the first duty which the agent owes to his principal. Without it, the perfect relation cannot exist. Reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies; in some it is so much the inspiring spirit, that the law looks with jealous eyes upon the manner of their execution, and condemns, not only as invalid as to the principal, but as repugnant to the public policy, everything which tends to destroy that reliance.
>
> Sec. 1189. It follows as a necessary conclusion from the principle last stated, that the agent must not put himself into such relations that his own interests or the interests of others whom he also represents become antagonistic to those of his principal. Indeed, this rule is but a re-statement of the previous one, and is based upon the same fundamental principles. The agent will not be permitted to serve two masters, without the intelligent consent of both. As is said by a learned judge: 'So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them, he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. *Fidelity in the agent* is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his

> own private interest to disregard that of his principal.' 'This doctrine', to speak again in the beautiful language of another, 'has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition "Lead us not into temptation but deliver us from evil", and that caused the announcement of the infallible truth that "A man cannot serve two masters" '."

We deal further with the fiduciary relations existing between Wm. S. Noyes and this corporation under the title of Agency on page 205 of this brief.

(b) Acquisition of Osborn Stock and Control of Presidio Mining Company.

In December, 1912, two persons owned the controlling majority stock of Presidio Mining Company, to wit, L. Osborn, 59,554 5/6 shares, India Scott Willis, 36,956 2/3 shares (standing in the name of Miss L. M. Doherty); total 96,511½ shares out of a total of 150,000 shares, all issued and outstanding. Wm. S. Noyes had only 1382 shares. The change in the stock holdings of these parties began December 12, 1912, after the receipt of the Gleim letter by Noyes informing him that Section 5 could be purchased. After the return trip from Oregon and the arrangement for the $10,000 loan from Bowers, 28,607 shares were transferred from Osborn to Wm. S. Noyes four days before the latter went to Texas. On splitting the Osborn stock in

December the certificates evidencing said shares were as follows:

No. 81, 28,606 1/3 shares, L. Osborn
No. 82, 28,607 shares, Wm. S. Noyes.

January 9, 1913 (506), these two certificates were cancelled and new certificates issued, three to Osborn for 10,000, 5000, and 13,606 ⅓ shares respectively, and three to Wm. S. Noyes for 10,000, 5000 and 13,607 shares respectively. These last transfers were made while Wm. S. Noyes was in Texas, and were handled by B. S. Noyes, the brother, who was about to become President of the company (577). This all took place before January 19th, the date of the alleged discovery of the Osborn shortage by Noyes. Relative to the ownership of said stock, on December 25, 1907, Osborn wrote Wm. S. Noyes as follows:

> "Now, Noyes, perhaps I did not make myself plain in my letter to you of the 14th inst. that I really own over 50,000 shares of the capital stock of the Presidio Mining Company which Mr. and Mrs. Boyd sold to me at a mere nominal figure, with the understanding that if you wanted one-half of said shares which I now own you can have them. So I wish you would please let me know at your earliest convenience if you will join me in taking this stock or not, as in case you decide not to take it I will endeavor to find some other purchaser" (655).

To this letter there is no reply. There is no evidence showing that Noyes ever bought said stock. There is no documentary proof adduced by the defendants showing the ownership or transfer to Noyes of said stock. Whenever he desired to sup-

port his own contentions during the trial of this suit he had voluminous data, figures, documents, cancelled notes and vouchers, showing his attention to details. On this particular point he has nothing. The fact is, he never was the owner of one-half of Osborn's stock. Only after the complainants late in 1915 discovered the facts relative to the Osborn shortage do the defendants shift their defense in this connection. After this discovery Noyes claims the ownership of the 28,607 shares since 1907. Prior to December 16, 1915 defendants all admitted and alleged that Osborn was the owner of the entire 59,554 5/6 shares up to December, 1912. Their averments follow:

> "* * * defendant admits that thereafter, and on or about December 12th, 1912, the defendant L. Osborn, then secretary and *principal stockholder,* of said corporation, from his stock holdings therein, then and there transferred to this defendant 28,607 shares of his stock" (answer, W. S. Noyes to original bill, 337).

> "That the annual meeting of stockholders for the years 1908, 1909, 1910 and 1911 were attended by only stockholders L. M. Doherty (36,956 2/3 shares), L. Osborn (57,223 1/3 shares), L. Osborn, Trustee (2,331½ shares), Wm. S. Noyes (1,382 shares)," etc. (idem. 337, 338).

> "That in the year 1912 this defendant had acquired an additional 28,607 shares of the capital stock of said Presidio Mining Company" (idem. 338).
>
> (See also (208, 209) answer of W. S. Noyes to amended bill of complaint.)

"* * * defendants admit that thereafter, and on or about December 12, 1912, the defendant L. Osborn, then secretary and *principal stockholder* of said corporation, from his stockholdings therein, then and there transferred to the defendant, Wm. S. Noyes, 28,607 shares of his stock" (answer, L. Osborn and B. S. Noyes to original bill, 338).

"That in the year 1912 said defendant Wm. S. Noyes had acquired an additional 28,607 shares of the capital stock of said Presidio Mining Company" (idem, 338).

In the answer to complainants' amended bill of complaint Wm. S. Noyes repeats these same statements, and so likewise does L. Osborn (209, 338, 339).

In W. S. Noyes' answer to amended bill appears the following:

"Defendant admits that on or about December 12th, 1912, L. Osborn the then *largest individual stockholder* of said corporation transferred to this defendant 28,607 shares of his stock, but this defendant denies that said transfer was made for the purposes mentioned in said bill of complaint, or that this defendant *obtained said stock from L. Osborn* as a part of or pursuant to the conspiracies set forth in said bill of complaint, or any conspiracy, or for the purposes mentioned in said bill of complaint" (166, 338).

(See same allegation (99), answer of L. Osborn and other defendants to amended bill of complaint.)

Counsel's explanation of transfer follows (Vol. II, pp. 341-345):

"The COURT. What is your theory as to the manner in which William S. Noyes acquired this stock of Osborn, for what consideration?

Mr. HARDING. The consideration was this, that Mr. Boyd and Mrs. Boyd, away back in 1907, had transferred that stock to Mr. Osborn for a nominal consideration, and with the understanding that Mr. Osborn should turn one-half of that stock over to Mr. Noyes at any time that he wanted it.

The COURT. For nothing?

Mr. HARDING. For payment of the consideration—half of the consideration which Osborn paid for it.

The COURT. What was that?

Mr. HARDING. That was merely a nominal consideration.

The COURT. Why did Noyes permit this stock to remain with Osborn, then, throughout seven or eight years?

Mr. HARDING. In the language of his own testimony, when I asked him that question on the stand he said, 'I was keeping off the books like all of the other large stockholders.'

The COURT. I do not remember that. They did not keep off the books. Boyd was on the books.

Mr. HARDING. No; from 1907, your Honor, Mr. Boyd kept off the books. From 1907, outside of Osborn, there was not a single stockholder of any large holdings that had the stock in his own name.

The COURT. Do you mean by that to infer that Boyd's transfer of stock to Osborn was not a bona fide transfer?

Mr. HARDING. That was bona fide.

The COURT. That is not keeping off the books; it is a disposition of the stock.

Mr. HARDING. It is a disposition of the stock, but the letter from Osborn shows he simply gave it to Osborn for a nominal consideration because he considered the corporation was a

bankrupt corporation, was on its last legs. He did not want any liability coming from a stockholders' liability later. Mr. Noyes was ordered at that time to shut the mine down, and when we look at the record, at section 8, for instance, and see the condition of the ore returns, it is very evident that the ore had gone down away below operating cost, and Boyd and his wife got out; Mrs. Willis shortly thereafter transferred her stock into the name of Miss Doherty. The records show that in this case, there was not any large stockholder of the former large stockholders that cared to hold stock in their own name. Here was stock presented, so to speak, to Mr. Noyes by Mr. Boyd. He simply let it stand where Mr. Boyd had put it, and there is nothing in the record anywhere to show that the testimony of Mr. Noyes is not absolutely true in that regard; it is substantiated by the letter of Mr. Osborn that that stock was given to him or transferred to him for a nominal consideration, but holding one-half of it for Mr. Noyes. There is absolutely nothing in the record anywhere except the statement——

The COURT. Have you got that letter there, the letter of Osborn to Noyes?

Mr. HARDING. Yes, I have it here.

The COURT. I have forgotten its tenor.

Mr. HARDING. Here is the important extract from that letter, which was dated the latter part of December, 1907: 'Now, Noyes, perhaps I did not make myself quite plain in my letter to you of the 14th instant, that I really own over 50,000 shares of the capital stock of the Presidio Mining Co., which Mr. and Mrs. Boyd sold to me at a mere nominal figure, with the understanding that if you wanted one-half of said shares, which I now own, you can have them. So I wish you would please let me know at your earliest convenience if you will join me in taking this stock or not, as in case you decide not to take it, I will endeavor to find some other purchaser.'

The COURT. That looks like a purchase; that does not sound like a gift.

Mr. HARDING. You mean from Boyd?

The COURT. To Osborn, and that Osborn expected to have Noyes pay his proportion of the expense of the purchase.

Mr. HARDING. At a mere nominal consideration. However, it was the equivalent of a gift.

The COURT. There was a tender to Noyes in 1907?

Mr. HARDING. Yes.

The COURT. Where was there any evidence that he ever elected to take advantage of that?

Mr. HARDING. Noyes testified that when he saw Osborn the next time he told him he would take that stock.

The COURT. Where is the evidence that he ever paid anything toward that stock. I want to be frank with you, Mr. Harding, because the evidence makes a bad impression upon my mind, as to the transfer of these big blocks of stock, and the subsequent conduct of the mine.

Mr. HARDING. *But there is no evidence other than that.*

The COURT. Mr. Harding, of course it is not alone to the positive statements of witnesses that we look in a case; it is the inferences that are to be drawn from all the circumstances under which things are done, just as potent, exactly, and usually more so, than the mere unsupported declarations of witnesses. I do not want to do anybody an injustice, but there are some things that must be cleared up in order to relieve my mind of the strong sentiment of wrong here."

Here was a direct challenge to the defendants to produce the testimony claimed by them to have been in their possession, as set forth in their motion to reopen said case (301). Instead of availing themselves of their opportunity to then and there ask

for the reopening of the case, in order to introduce the evidence which they claim to have been familiar with, they rested upon the proof then adduced and elected to take their chance on a decision with the facts claimed to have been well known to them at the time. We maintain such action is an acknowledgment of the lack of evidence to prove ownership in Wm. S. Noyes of any of the shares of stock of Osborn at any time prior to December, 1912. Had Noyes owned such a large stock interest he would have actively participated in the San Francisco management of the company. It is admitted that Osborn had embezzled $100 to $300 monthly for some years prior to January, 1913. Noyes would not have countenanced Osborn, known by him to have been short in his accounts before (539) to have run the company with four dummy directors. In his affidavit of December 16, 1915, Wm. S. Noyes averred as follows (340):

> "In this connection affiant further says, that for more than six years prior to February, 1913, the affairs of said corporation had been conducted by the said Osborn, as secretary and director in conjunction with four dummy directors, of whom Chas. H. Fish was succeeded by B. S. Noyes on said board, and of whom F. H. Gardiner and E. A. Herger were succeeded on said board by this affiant and the said L. M. Doherty."

The foregoing refutes the assertions to the contrary in appellants' brief (page 146).

No court would allow a claim by Noyes against Osborn's estate in the event of Osborn's death.

Had Noyes died, the family of Wm. S. Noyes could have sustained no claim against Osborn for said stock under all these facts.

Osborn was fearful of a disclosure of his crime. The 28,607 shares were taken from him by Noyes before leaving for Texas. After his return the 30,-937 5/6 remaining shares were taken from him by the Noyes brothers, 25,011 shares by Wm. S. Noyes and 5,926 5/6 shares by B. S. Noyes. Osborn then retained 10 shares to qualify as a director. There was no vacillation by Noyes. He says he had ascertained the cash on hand from Osborn before going to Texas. If so, why was it necessary for him to wire to B. S. Noyes in January as a "measure of extreme caution"? Why necessary to destroy these telegrams? Section 5 was then under Wm. S. Noyes' control. Noyes demanded that he, his brother, Mrs. Willis, or Miss Doherty representing her, go on the board. Concerning the orders sent by Noyes he testified (688):

> "I drew up the lease. As soon as it was executed, I sent it up to my brother, and told him to tell the company to execute it, and to put discussion of the matter over until I got up."

This lease of January 25, 1913, for 50 cents per ton royalty was in effect a direct contract between the corporation and Noyes. It had been sent by Wm. S. Noyes to his brother in San Francisco, with orders to have Osborn call the directors together and adopt the same (688). The written evidence of the transactions on the company's

minutes (473, 477) pertaining to the meeting of January 29 had by these respective defendants are false in stating:

(a) Fish's place was declared vacant;

(b) B. S. Noyes was elected director;

(c) Peat resigned as president;

(d) B. S. Noyes was elected president;

(e) Peat was elected assistant secretary.

Fish was present at the meeting, as Gardiner and Herger testified (444, 446, 454, 455). The lease was adopted and the $15,000 loan authorized, but no information was given of Noyes' ownership of the Silver Hill stock, and nothing was said as to the Osborn shortage. B. S. Noyes prepared the minutes of this meeting on January 28th and on the assumption that Fish would be absent. He was present. The minutes however, were written up as prepared irrespective of this fact (577).

After this meeting of January 29, 1913, Gardiner and Herger resigned by request. The Fish stock was cancelled and the shares issued to B. S. Noyes. On January 31st, the date of the Gardiner and Herger resignations, W. S. Noyes and L. M. Doherty were elected directors and the new board was then composed of Wm. S. Noyes, vice president and general manager, controlling, B. S. Noyes, L. M. Doherty, Osborn the thief, and Peat the former dummy president. These defendants continued Osborn in office at a salary of $300 per month. B. S. Noyes was elected president and paid $150 a month salary to watch Osborn (249). Peat as

former president had received $25 a month; he now had the position of assistant secretary created for him, with the same salary. Wm. S. Noyes' salary was $450 per month, the same as theretofore, but from this time on was charged to the corporation in San Francisco, whereas theretofore and always up to this time it had been charged in Texas as a part of the general operating costs of the company.

The first meeting of this new board was held February 15, 1913. Two things happened, first the bonus resolution of $45,000 was adopted, $11,000 payable forthwith to Wm. S. Noyes. Second, Noyes was given full power to hire and discharge any employe of the corporation, including his superintendent. With his biddable board in San Francisco, and power to hire and discharge company operatives, Noyes' power has been ultimate and absolute from that day to this.

On said date the bonus resolution was adopted, Wm. S. Noyes explaining it (750, 759). How did Wm. S. Noyes involve his estate for $24,000 when this bonus resolution provided for the unconditional payment to him of $45,000? Appellants insist that because of the Osborn shortage the company could not pay $24,000 for Section 5, yet the company could and did obligate itself to pay $45,000 as a bonus for obtaining one year's lease on said section.

The bonus resolution indicates fraud. It was prepared by the attorney, B. S. Noyes, submitted to his brother, Wm. S. Noyes and approved by him;

it states that the company will pay $45,000 *from its own treasury,* and not from Section 5 profits. It further says that Wm. S. Noyes had expended large sums of money in securing said lease, which is incorrect. He paid nothing. The vouchers show expenses paid by Presidio Mining Company for Section 5 account (521, 522). The company paid for all assaying (568); also $22.05 for telegrams (522); all these telegrams and all correspondence covering this period are destroyed (649, 746). Yet on any point desired by Mr. Noyes he has most voluminous and minute data carefully segregated, analyzed and collated through past years.

February 21, 1913, Osborn executed a promissory note for $10,689.75 to Wm. S. Noyes, giving as collateral 25,000 shares of his stock, with full power to sell the same publicly or privately, with or without notice, on default. Osborn has paid nothing on said note. Wm. S. Noyes testified that the "$11,000 forthwith" was advanced to him to conceal the Osborn shortage (753). This $11,000 was split in two payments, $6,000 February 24th and $5000 February 28th.

This sum of "$11,000 forthwith" was actually handled in the following manner: On February 24th a check for $6000 was drawn in favor of Wm. S. Noyes, signed by B. S. Noyes and L. Osborn (526). Noyes deposited this sum in his account in the Anglo & London Paris National Bank, and on February 25th drew his check for $5000 in favor of L. Osborn (576); Osborn cashed this check and on

the same day (February 25th), deposited the money to the credit of the Presidio Mining Company (588), but no corresponding entry in the books of the corporation was made. Three days later, on February 28th, the company drew another check in favor of Wm. S. Noyes, this time for $5000, which check was also deposited in Noyes' bank, and on March 1st Noyes gave Osborn a check for $5689.75. The same day Osborn cashed this check and deposited the money to the credit of the Presidio Mining Company, again making no entry of this deposit.

In this way, the original $6000 had been made to do duty twice. It went out the front door of the corporation quite boldly, and then slipped in the back door without even ringing the bell. By making two such round trips, $6000 had been made to cover up a shortage of $10,689.75.

A receipt for $11,000 was placed in the company files by Wm. S. Noyes. The shortage was thus concealed. What should have been done was to have a tabulation made of the amount due on the shortage of Osborn and a charge on the company's books made against him, and payments made thereon to the extent of said indebtedness. There would have then been a proper entry on the books of the corporation and no concealment. In the shuffle 25,000 shares of the Osborn stock remained with Wm. S. Noyes, plus $310.25. The moneys thus taken from the treasury were illegally taken. The funds passed through Noyes' hands back again into the company treasury, pursuant to a conspiracy on the

part of the defendant directors. This did not repay Osborn's obligation to the company. He still owes the company $10,689.75, besides other shortages discovered later.

Wm. S. Noyes then controlled the Silver Hill Mill & Mining Company, the corporation owning Section 5. He was the dominant power in the affairs of the Presidio Mining Company in San Francisco by reason of his control over Osborn and the dependence placed in him by Mrs. Willis, superinduced by the $18,000 yearly dividends as a bait. This bonus providing $45,000 for obtaining a lease on property costing $24,009.33, said property being taken over with the promissory notes given first, for $10,000 to the bank secured by collateral taken from Osborn in December, 1912; second, for $10,000 to Bowers, the contractor who held his position by sufferance and authority of Noyes; and third, $5,000 to Harry Young, a storekeeper in Shafter who likewise could only participate in company business with Noyes' consent, clearly indicates a most glaring fraud and abuse of a fiduciary relation on the part of Wm. S. Noyes, which was never acquiesced in by the minority interests of this company, and the real transactions were never known to them.

On March 12, 1913, B. S. Noyes received 2,320½ shares of the Osborn stock, and W. S. Noyes the remaining 11 shares, all for no consideration. The original 59,554 5/6 shares by this date had been split as follows (506):

Dec. 12, 1912 To W. S. Noyes outright	28,607	
Mch. 12, 1913 To W. S. Noyes outright	11	
Feb. 12, 1913 To W. S. Noyes as collateral	25,000	53,618
Feb. 21, 1913 To B. S.Noyes outright	3,606 1/3	
Mch. 12, 1913 To B. S. Noyes outright	2,320 1/2	5,926 5/6
Total Osborn stock to Noyes Bros.		59,544 5/6
Feb. 21, 1913 Willis stock to B. S. Noyes		5,000
Remaining Willis stock		31,956 2/3
W. S. Noyes prior to Dec. 12, 1912		1,382
		97,883 1/2

Miss Doherty testified she placed her holdings in the voting trust to give Noyes control (507). This voting trust was to continue for five years. The above tabulation discloses that in December, 1912, Wm. S. Noyes had 1382 shares. Through the Osborn shortage he was able to strip Osborn of his entire holdings, leaving but 10 shares. If Osborn objected, he could be branded a felon. Noyes allowed Osborn to continue as director and secretary at $300 a month. Mrs. Willis consented to these transactions; likewise Miss Doherty, who represented her. The inducements held out to these

two last named in the Willis letter were about $15,000 per year dividends if the cyanide plant were installed, even after the 5000 shares of the Willis stock had been transferred to B. S. Noyes. Had this representation been fulfilled, the 10,000 shares transferred to B. S. Noyes would yield him $5000 a year for his part in the transactions. His work comprised about two months, San Francisco manipulations interlocking with those of his brother in Texas. The defendants participating in these transactions never paid a dollar for the stock acquired by them. The complainants in this suit represent a family investment of about $60,000 in cash (579).

B. S. Noyes testified he was the "errand boy" for his brother. Peat testified he did as he was told by the Noyes brothers. He admitted he did not tell the truth to Overton (893). Miss Doherty followed the Noyes' suggestions. Osborn was powerless, Wm. S. Noyes directing his acts in January, 1913. This indicates every move was carefully planned concerning the various transactions we have outlined. Since January 31, 1913, this board has acted as the nominees of Wm. S. Noyes. He in effect has been the corporation. All are in *pari delicto*. The monthly salaries have been: $450 to Wm. S. Noyes, $150 to B. S. Noyes, $300 to L. Osborn, $25 to John W. F. Peat, Wm. S. Noyes raised Gleim's salary in January, 1913, from $250 to $350. In August he raised Gleim's salary to $450, contrary to the by-laws of the corporation (511, 756) (appendix 28). Since September 23, 1915, when Osborn was deposed, Peat

has been secretary with a salary of $270, part of which continually found its way into the Osborn family, according to an affidavit made by Peat and filed in the trial court. Mr. Klink testified that $75 a month is sufficient pay for keeping the company books in San Francisco (1015).

This combination by the majority stockholders to carry out a predetermined plan constitutes such majority the actual, if not technical, trustees for the company's minority stockholders. The devolution of power imposes correlative duty.

Jones v. Missouri-Edison Elec. Co., 144 Fed. 771;
Miner v. Belle Isle Ice Co., 17 L. R. A. 418;
Meeker v. Winthrop Iron Co., 17 Fed. 48.

Wm. S. Noyes comes within the purview of the rule, that one in control of a majority of the stock and of the board of directors of a corporation occupies the relation of a fiduciary towards the minority stockholders. Every act in his own interest to the detriment of said minority becomes a breach of duty and trust.

Hyams v. Calumet & Hecla Min. Co., 221 Fed. 537;
Jones v. Missouri-Edison Elec. Co., 144 Fed. 771;
Wheeler v. Abilene Nat'l. Bank. Bldg. Co., 159 Fed. 391.

The facts heretofore stated constitute actual fraud.

Jackson v. Ludeling, 21 Wallace 616;
Wheeler v. Abilene etc. Co., 159 Fed. 391;

Jones v. Missouri-Edison Elec. Co., 144 Fed. 765;

Barker v. Montana etc. Co., 35 Mont. 351; 89 Pac. 66;

Miner v. Belle Isle Ice Co., 17 L. R. A. 412;

Cited in Cowell v. McMillin, 177 Fed. 43.

(c) Management of Presidio Mining Company after January 1913.

The board of directors after January 31, 1913, was comprised of the defendants in this case, of which Wm. S. Noyes was the dominant control. Each defendant participated with him in all the manipulations of the company affairs, the resolutions, acts and proceedings as shown by the minute book of the company.

Under the pan amalgamation method the cost of treatment, including San Francisco salaries, was $9.51 per ton. Since the cyanide installation operating costs have been about cut in half. Nevertheless, Noyes figured Section 8 as losing money continuously since said installation (appendix 31). Mr. Klink testified that in 1911 and 1912 the company cleared $32,000. In November, 1912, the company lost $6173.05. In December, 1912, the company cleared $6946.71. In January, 1913, the books show a loss of $2377.96. This month expenses began to pile up because of arrangements to operate Section 5. From November, 1912, to April, 1913, inclusive, under the old pan amalgamation method the profits were $23,379.33 (1073). This sum was nearly sufficient to pay for Section 5, had the company been allowed to

do so. If it was a good purchase for Noyes, it was a good purchase for the company. By active concealment of the facts from the corporation stockholders, and by the transactions as carried out he actually prevented the corporation from securing the property or evidencing any desire to do so. It would have been just as easy to have acquired the loans for the corporation and paid the money from the earnings during the above period as to pay the money to himself from the corporate treasury, for the corporation assets were behind the deal. During 1913 he drew moneys from three sources:

1st, up to October 30, 1913, he had drawn $2003.60 pursuant to the terms of the January 25th lease providing for 50 cents per ton royalty;

2nd, up to October 30, 1913, he claimed to have drawn $24,500 under the terms of the bonus resolution. This sum should have been $21,000 because of the concealment of the $3500 item in September, 1913, making the total sum of $23,003.60 received by Noyes. He had in addition manipulated the $3500 in further concealments of Osborn shortages;

3rd, subsequent to November 19, 1913, he drew during the remainder of the year approximately $3000 more under the provisions of the contract of said date.

The actual condition of the company for several years prior to 1913 was as follows (993):

Date	Cash, Drafts, &c.	Supplies	Liabilities	Total
Aug. 31, 1908	$39,498.95	$21,390.69	$737.50	$60,152.14
Aug. 31, 1909	28,515.66	22,772.05	None	51,287.71

Date	Cash, Drafts, &c.	Supplies	Liabilities	Total
Aug. 31, 1910	18,924.82	19,104.33	None	38,029.15
Aug. 31, 1911	28,262.59	25,335.54	None	53,598.13
Aug. 31, 1912	31,724.27	21,737.05	None	53,461.32

In November, 1912, Noyes suddenly decided a cyanide plant was a necessity. This was the month Gleim reported to him the opportunity to purchase Section 5. A month earlier Noyes had reported to the stockholders that the company had netted $17,-510.14 in the preceding twelve months; that a new oil burning engine had been installed which would effect a large economy in operating expenses, and that "the company's plant is now in most excellent condition."

Appellants base their defense largely on what they claim to be the perilous financial condition of the company "during the crucial period immediately preceding and following January, 1913" (appellants' brief page 89). This period is variously alluded to as one of "impecuniosity", "impoverished coffers", "tottering on the verge of bankruptcy", etc. Appellants claim the company was rescued from ruin by Wm. S. Noyes—even going so far as to call him its "savior" (appellants' brief 162)—alleging that the pan amalgamation plant could no longer work the ores at a profit. Did Wm. S. Noyes buy Section 5 for himself to save the company, and then have the company install a cyanide plant on its own credit to work *his* ores for an alleged half the net, thus completing the salvation?

The alleged good condition in August, 1916, is presented to this court (appellants' brief 93) to prove how effectively he saved the company, and on pages 89 and 90 certain figures purporting to show the "crucial" condition in 1912-13. In both instances figures were altered by *suppression* and *substitution.* On page 89 appellants have suppressed assets entered in the Klink Bean schedule 15, and have inserted an item "Net $7823.50", manufactured by the appellants *through said suppression.*

Klink Bean schedule 15 (1008) does not show "Net $7823.50" on November 30, 1912, but does show a "Net Worth" on said date of $41,265.40.

Likewise instead of the "Net $13,438.02 Dec. 31, 1912" (appellants' brief 89) said schedule shows a "Net Worth $48,212.11"; instead of the "Net $11,021.17 Jan. 31, 1913", a "Net Worth $45,834.15" on said date; instead of "Net $15,259.35 Feb. 28, 1913", a "Net Worth $54,848.07"—this last figure is complicated (col. 4) by "Mining Lease $45,000" entered as an asset, and "Resolution $34,000" entered as a liability.

It is proven by appellants' own figures that the so-called "crucial period", extending over the six months from November, 1912, to April, 1913, inclusive, all under the pan-amalgamation plant, were exceedingly prosperous. Defendants' Exhibit ..... (1073) shows the gain and loss month by month for this period, as follows:

Nov. 1912	Loss	$ 6173.05	Col. 2
Dec. 1912	Gain	6946.71	" 3
Jan. 1913	Loss	2377.96	" 4
Feb. 1913	Gain	9013.92	" 5
Mar. 1913	Gain	3097.14	" 6
Apr. 1913	Gain	12872.57	" 7

Net profit for the six months, $23,379.33 (col. 1). This is at the rate of over $46,000 a year, or more than 30% earnings to the stockholders.

We append schedule 15 in full in the appendix to this brief because of its importance, since appellants have laid such stress on the loss of $2377.96 in January and the overdraft of $3303.72 in December, 1912.

Defendants' own figures prove that Section 5 could have been bought and paid for from the operating profit made under the pan amalgamation method during the six months of the "crucial" period. Further had Osborn's peculations of over $15,000 been made good, the company could have bought Section 5 from its earnings and had over $14,000 left in the treasury. And on October 7, 1912, Wm. S. Noyes reported to the stockholders that "the company's plant is now in most excellent condition."

Compare this situation with that of August 28, 1916, after the appellants had been in control of the company for over three years. On page 93 appellants' brief, they have arranged a table which is manufactured from the testimony *in part* of B. S. Noyes August 28, 1916 (1057). Appellants de-

sire to prove the company prosperous on this date, so this time they have as carefully suppressed *Liabilities* of August 28, 1916, as they did *Assets* of the "crucial period" 1913, from Klink Bean schedule 15.

"Net Worth" means what is left over after outstanding liabilities are paid (Sch. 15). Instead of the "$85,576.44" represented as the condition of the company August 28, 1916, we have a *deficit* of practically $15,000 on that day, as sworn to by B. S. Noyes (1057-1058):

> "The total of these liquid assets is $85,576.44, against which 28/31 of August expense has run; it is an undetermined amount; but figuring from the usual operating expense, that would amount to $22,600; hence we have a surplus in cash, bullion and supplies of $62,-976.44 approximately; no bills whatever due, no obligations, save what may be found due to Mr. W. S. Noyes" (1058).

This changes the $85,576.44 presented in appellants' brief (93) to $62,976.44, without subtracting "what may be found due to Mr. W. S. Noyes".

On cross-examination (1060) B. S. Noyes admitted that on July 1, 1916, Wm. S. Noyes' claim

> "would be, I should say, $69,000 to $70,000".*

In the same paragraph, B. S. Noyes admits:

> "It comes pretty close to $4000" (a month) "for those particular six months" (1060).

* Note.—The amounts in the transcript as prepared by appellants are in numerals, and all amounts in this cross-examination are in numerals, except the $69,000 to $70,000, which is written out fully and therefore difficult to follow in reading without close scrutiny (1060).

Hence Noyes' claim on August 28, 1916, would be approximately $78,000, against B. S. Noyes' alleged assets of $62,976.44, which proves a *deficit* of over $15,000 on said date.

Thus, the net worth of $48,212.11 December 31, 1912, (1008) which included cash, bullion, supplies, bills payable and receivable and all liabilities, has dwindled to a deficit of $15,000 August 28, 1916, as testified to by B. S. Noyes on said day.

In addition, from 1913 to that date Section 8 had used up over 60,000 tons of its ore (996, 998, 1000), a very different story from what appellants' brief states.

Klink Bean's schedule 1 shows that each of the three years prior to 1913 ended with a substantial amount of cash on hand in the company's treasury, as follows (993):

August,	1910	Cash	$19,824.82
"	1911	"	28,262.59
"	1912	"	29,454.27

Thus, at the end of the fiscal year 1912, which appellants designate as being on the verge of bankruptcy, the company had the very substantial sum of nearly $30,000 cash in the treasury.

Contrast with this the history of the three years following (993):

August, 1913	Cash	$ 9,136.56
December, 1914	"	17,512.82
December, 1915	"	4,247.26

The above shows that in December, 1915, when the injunction was granted preventing the defend-

ants from drawing moneys, the company's treasury was practically empty.

Therefore, appellants' own figures prove that the company was prosperous in the crucial period, and, after three years of their management, was bankrupt August 28, 1916. It was not the installation of the cyanide plant which proved such a heavy drain on the corporation, but the installation of the "live" board of directors, dominated and controlled by Wm. S. Noyes.

The results during the years succeeding 1912 prove he controlled the corporation for his own personal ends. He used the company's plant solely for his own profit. The corporation has utterly failed of its purpose, because of the dominant power represented by Wm. S. Noyes, exercised with the connivance and consent of his biddable board. The Klink Bean schedules show that immediately on his securing control, Section 8 ore values were forced down and Section 5 tonnage forced up. A comparison follows:

		Section 8.	Section 5.	
1913	Tonnage produced	14,722	6,848 tons	(996)
1914	" "	23,594.5	17,093.9 "	(998)
1915	" "	23,430.3	30,806.8 "	(1000)
1913	Alleged gross value of ore	$113,429.49	$127,197.62	(996)
1914	Alleged gross value of ore	107,514.28	161,211.79	(998)
1915	Alleged gross value of ore	99,954.74	214,546.69	(1000)

The result was that the Section 8 losses, plus the San Francisco salaries, absorbed the alleged half the net from Section 5. See B. S. Noyes' letter page 31 appendix this brief.

This result was obtained by the use of two methods: First, methods of assaying; second, the dollar differential.

1. The assays were taken by grab sample. The ore recovery from the mill was figured at 59% of the stope assays. The following shows the actual computations:

	Calculated Contents Stope Assays X Tonnage.	Actual Yield Ounces.	
1913	679,923.61	420,383.31	= 61.82 %
1914	1,188,394.17	524,863.66	= 44.165%
1915	1,696,237.44	656,091.52	= 38.67 %

Mr. Lasky, who was familiar with the system, testified that the manner of assaying was not susceptible of accuracy (930). Kniffin testified that a system of assaying and sampling which is from 48% to 76% of the actual recovery is very inaccurate (951). This assaying and sampling left all matters in the power of Wm. S. Noyes and his nominees, to produce any alleged assays he wanted. No assays were taken from the different working faces of the same stopes and tonnages kept of ores from said working faces. The following table illustrates this point:

COMPUTATION OF NOYES' ALLEGED PROFIT BY NOV. 19, 1913, CONTRACT.

Take Stope 13 for example:

If ore is broken from two working faces each is assayed. If one face assayed 100 ounces and the other 10 ounces, the value of ore from that stope was taken as follows:

	100	
	10	
Divide by number of faces,	2/ 110	
	55	ounces

This was used as the value of the commingled ore, regardless of the tonnage from each face.

If 4 tons were taken from the 100 oz. face and 1 ton from the 10 oz. face the value was:

	4 x 100 = 400	oz.
	1 x 10 = 10	"
Divide by number of tons,	5/ 410	
	82	oz.per ton commingled ore

If reversed, viz: 1 ton from the 100 oz. face and 4 tons from the 10 oz. face, the value is:

	1 x 100 = 100	oz.
	4 x 10 = 40	"
Divide by number of tons,	5/ 140	
	28	oz.per ton

Noyes took the average assay, 55 ounces, as the value of his 5 tons, as follows: 5 x 55 = 275 ounces, as the basis of his recovery.

This inaccurate method is provided for in the November 19, 1913, contract. The system is wrong. The bullion computations based thereon are likewise wrong. Noyes has received $59,836.20 in cash and claims the company owed him approximately $80,000 more at the time of the submission of the case, which it could not pay. The fictitious losses of Section 8 have more than absorbed the alleged half of the net from Section 5. Mr. Klink testified he would not purchase ores under the conditions obtaining (1010-1011).

2. The dollar differential provided by the November 19, 1913, contract is also inherently wrong. We present the following abstract example for the purpose of exhibiting the principle involved, as the actual figures of tonnage and values are complicated and confusing:

Assume 3000 tons of ore produced in any one month, 2000 from Section 8 and 1000 from Section 5. With an operating cost of $6.00 per ton, the 3000 tons would cost	$18,000
$1.00 per ton was arbitrarily deducted for the ores from Section 5, the 1000 tons, therefore, would be charged	5,000
Making the 2000 tons from Section 8 absorb the remaining	$13,000

or $6.50 a ton, a differential of $1.50 instead of $1.00.

Appellants' brief (p. 369) attempts to refute this example by showing that a certain part of the dif-

ferential is returned to the Presidio Mining Company in the division of the "larger net" (whatever that may be), and that this amount returned reduces the differential back to the $1.00 the contract appears to call for. In order to prove this theory, appellants have to drop their example in the middle, and leave the $1.00 which they have deducted from the alleged lesser operating expense of Section 5 to take care of itself by vanishing into thin air. Unfortunately, an expense of $1.00 per ton has to be taken care of in some definite account, which in this case is the expense account of Section 8. Therefore this $1000 deducted from the expenses of mining 1000 tons from Section 5 is added to the $12,000 expense of mining 2000 tons from Section 8, making $13,000 to be charged to the 2000 tons from Section 8, a cost of $6.50 per ton,—and we are back again to the differential of $1.50.

But our example is more favorable to appellants than the actual facts. During the year 1913, instead of the above 3000 tons of ore, 6848.2 tons were mined from Section 5 and 14,686.2 tons from Section 8, with a difference in cost between the two sections of $2.77 per ton in favor of Section 5 (1018), and in 1914 it was $1.66 per ton (1019), instead of the pretended $1.00.

Appellants submit the unique argument that because Wm. S. Noyes returned half the sum abstracted under this arrangement in the division of half the net to Section 8, that there was therefore

nothing wrong about it. In other words, if a man takes $100,000 and returns $50,000 of it to the owner, he is not guilty of theft,—it is fair and generous of him to return half the money,—he might have kept it all.

Appellants attempt to justify this $1.00 per ton reduction in cost of Section 5 ore by the testimony of Mr. Gleim, on an estimate of tonnage made by measuring the places where ore had been taken out three years before, and figuring the distance in tramming. This is an absurdity (1043-1054). Yet even with this strained effort, Mr. Gleim could only figure 88.9 cents in favor of Section 5 from Jan. 1, 1913, to Aug. 31, 1914.

We can estimate what Wm. S. Noyes obtained through the dollar differential, but how much he obtained through juggling the assays he alone knows. It is inconceivable that a man who would work out such a complicated and concealed system of mulcting the company as the dollar differential, would hesitate to take advantage of a method so ready to his hand and so absolutely untraceable as the erroneous assaying system used, which the witness Lasky, who is never mentioned in appellants' brief, testified, was not susceptible of any accuracy (929-946). All computations made on Section 5 bullion production as a basis of payments to Wm. S. Noyes were made by him without check of any kind. Appellants' brief, page 358, claims that Form 15 was attached to the computations, but Noyes' own testimony shows (700) that this Form

15 was never in the company office until demanded by Captain Overton.

Some claim is made that the purchase of Section 5 was a speculative and hazardous enterprise. If so, why pay $45,000 for a lease on the same? The bonus resolution says Noyes obtained the lease at the request of the corporation. The evidence shows he forced it upon the company. He never spent a dollar in securing the lease. The resolution says he spent large sums. Noyes claims the $45,000 bonus was intended to be half the net from Section 5. If so, the enterprise was not hazardous, because Noyes knew before February, 1913, that he could make $90,000 profit in six months. Again, if it be true that it was intended to be half the net, why draw $2003.60 from the company on the basis of 50 cents royalty up to the middle of October, 1913, and during the same period draw money under the terms of the so-called bonus resolution. The contract of November 19, 1913, is a vicious fraud on the minority stockholders. The original lease calls for a 30 days' notice of cancellation. Where is said notice? The resolution authorizing the contract of November 19th says that the January 25th lease is unfair to Noyes ;and he refuses to go on with it. Noyes admits he prepared this new contract (759).

The law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity.

Wardell v. R. R. Co., 103 U. S. 658;

Meeker v. Winthrop Iron Co., 17 Fed. Rep. 48;

Wilbur v. Lynde, 49 Cal. 292;
Sims v. Petaluma Gas Light Co., 131 Cal. 659;
Wickersham v. Crittenden, 93 Cal. 29;
10 Cyc. 787, 807.

Directors of a company cannot exercise their powers for their own personal ends against the interests of the company.

Koehler v. Black River Falls Iron Co., 2 Black. 720, 721;
Jackson v. Ludeling, 21 Wall. 625, 631;
Ervin v. Oregon Ry. & Nav. Co., 27 Fed. Rep. 632, 635;
Wardell v. Railroad Co., 103 U. S. 651, 657, 658;
Davis v. Rock Creek L. F. & M. Co., 55 Cal. 364;
Oakland Bank of Savings v. Wilcox, 60 Cal. 141;
Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 317, 319.

Persons combining to cheat and defraud another are all liable to the defrauded party.

Lomita Land & Water Co. v. Robinson, 154 Cal. 46;
Lincoln v. Chafflin, 7 Wall. 138.

It is not essential that the participants shared in the profits of the fraud.

Lomita Land & Water Co. v. Robinson, 154 Cal. 46;
Stony Creek Co. v. Smalley, 111 Mich. 321; 69 N. W. 722.

It is immaterial whether the nominees of a controlling stockholder know of the interest of said controlling stockholder or not.

Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352;

Munson v. Syracuse R. R. Co., 103 N. Y. 74; 8 N. E. 358.

See also:

United States v. Standard Oil of New Jersey, et al., 152 Fed. 294;

Wiborg v. U. S., 163 U. S. 658;

Moore v. Finger, 128 Cal. 319;

Maloy v. Berkins, 11 Mont. 138; 27 Pac. 444;

Dodge v. Goodell, 12 Atl. 238;

2 Pomeroy, Secs. 926-928.

At the annual meeting in October, 1913, the same defendants attempted to ratify their own acts as directors and officers by resolution (482, 483).

Attempted ratification of their illegal acts as directors, by the same persons constituting the majority stock, at a subsequent corporation stockholders' meeting, does not validate said acts.

Woodroof v. Howes, 88 Cal. 199;

Curtin v. Salmon River Hydraulic Gold Min. Co., 130 Cal. 351;

Camden Land Co. v. Lewis, 63 Atl. Rep. 533.

The burden of proof is on directors dealing with the corporation to show transactions to be fair and

honest, and said transactions will be subject to the closest scrutiny.

Ross v. Quinnesec Iron Min. Co., 227 Fed. 343;
Sage v. Culver (N. Y.), 41 N. E. 514;
Miner v. Belle Isle Ice Co., 17 L. R. A. 417;
Meeker v. Winthrop Iron Co., 17 Fed. 51.

(d) Secret Side Profits of Wm. S. Noyes.

Out of 471 pages of appellants' brief, we find only one page devoted to the defense of Wm. S. Noyes touching the subject matter of secret profits made by him in Texas covering a period of many years, and arising out of the relations of the Presidio Mining Company with third parties, directly and indirectly and concerning which information was elicited during the trial from Wm. S. Noyes himself.

On page 373 of appellants' brief the following statements are made:

> "The transactions are all fully explained in the testimony * * * they all ceased and determined long ago * * * the transactions themselves were perfectly open, wholly unconcealed, and frankly disclosed."

In his answer to the amended bill Noyes averred that he disposed of his business interests approximately three years ago (193).

In his testimony during the trial he first stated that his business interests ceased in the nineties (731); confronted with his answer he changed his testimony (773).

During all these years while connected with the corporation as the sole managing and confidential employe and agent, it appears that Wm. S. Noyes had received compensations from three now known sources:

1. From E. G. Gleim Company;
2. From Benton Bowers;
3. From James Mann.

E. G. Gleim, doing business as E. G. Gleim Company, for many years conducted a general merchandise store in Shafter, Texas. The company employes traded with said merchant, and at the end of the month the moneys payable to the merchant for goods purchased and accounts owing were turned over to him by the Presidio Mining Company in a lump sum, and deductions made by the corporation from the individual employe's wages. In connection with these matters E. G. Gleim paid Wm. S. Noyes monthly compensation (730-734; 773-786), which was a respectable sum, considering the trade of one to two hundred employes.

Benton Bowers, the company contractor hauling freight and selling wood to the company, likewise paid moneys monthly to Wm. S. Noyes, approximating $100 per month (928).

James Mann, a mine foreman in the employ of the corporation, operated a company boarding house in one of the company structures, and he too divided monthly with Wm. S. Noyes the profits made therefrom (773-4; 785).

It thus appears that Wm. S. Noyes, under a liberal and fair salary covering all these years, and as the confidential agent of the corporation, personally secretly profited in addition to his salary from these various sources. He received a salary of $450 a month, and approximately $100 a month and upwards from Benton Bowers, and also sums from the Gleim store, and drew moneys derived from profits made in feeding men employed by the corporation. We find no instance in any recorded case where a confidential agent of a corporation stopped to such profiteering.

Nowhere does Noyes explain, nowhere is it shown by Noyes or any of the defendants, that the corporation or any official or any stockholder ever knew or was informed of these secret side profits made by Noyes and defendants all denied knowledge of same (127, 128). The facts were only disclosed at the time of the hearing when pressure forced the exposure of the same.

The law dealing with such matters is clear. It is not necessary for the principal to be damnified. Fiduciary relations require a full disclosure to the principal, and unless such profits are fully disclosed and the principal consents to their retention, they must be repaid to the principal by an agent. The law touching these matters is fully covered under the title of Agency hereafter discussed in our brief. The trial court only did its duty under the facts disclosed in requiring an accounting as to this profiteering in order to ascertain

the exact amounts due from Wm. S. Noyes to the company.

3. WITNESSES.

(a) Attitude of defendants.

(b) Conflicting testimony.

(c) The $3500 transaction.

(a) Attitude of Defendants.

We advert to the attitude of defendants. In addition to the active concealments of records, falsification of company books, destruction of letters and documents elsewhere mentioned in this brief, appellants have continued to conceal information and destroy records. B. S. Noyes, president, on August 16, 1915, wrote to E. M. Gleim (916):

> "About one month ago, one W. S. Overton, a stockholder of this company, appeared in San Francisco and subsequently filed a complaint in the United States District Court for this District, against the company and its five directors, the said complaint being filed with malicious, false and slanderous statements, mostly made up out of whole cloth and with no foundation whatever in fact."

Further on in the same letter he informs Gleim that (917):

> "* * * it is the right of the stockholder to see the books of account, statements and *perhaps* official communications; he is not entitled to any clerical assistance, to any explanations or to have any employes of the corporation take pains to elucidate matters that he cannot work out for himself."

Again he says:

> "The foregoing is written to you with the idea that you will better know how to meet such a situation should any such arise hereafter."

On August 26, 1915, replying to Overton, he wrote (912):

> "* * * The apportionment of bullion yield about which you inquire, is almost entirely a matter of arithmetic and I informed you plainly that the tonnage and stope assays can be verified only by Mr. E. M. Gleim, the Superintendent."

In response to Overton's request for information relative to location of certain stopes, he says:

> "* * * those which lie within the boundary line of Section 5 belong to Section 5 and those within the boundary lines of Section 8 belong to Section 8."

His position relative to duplicate copies of the Internal Revenue Returns is shown as follows:

> "There are no retained returns of these statements and they are not required by law to be kept. As to asking for these from the Internal Revenue Service, I positively refuse to do so or to permit any employee of the company to do so for the following reasons: They are not required to kept by the company, they cannot be of any possible service in determining whether or not the affairs of the Presidio Mining Company have been honestly and efficiently managed, and there can be no reason for requesting them, save a desire to pester and annoy the officers and employees of the company."

His closing remarks are:

> "In this connection I have the honor to inform you that the law will not permit you to spend the remainder of your natural life in the office of the Presidio Mining Company and you are hereby notified to complete your investigations within a reasonable time and leave the officers and employes of the Presidio Mining Company free to attend to the daily business of the company."

In November, 1915, Gleim refused Overton access to the books at the mine on orders from B. S. Noyes (590).

The annual meeting is another illustration (591-594). The meeting was advertised to be held February 28, 1916. On the 26th an alleged defect in the amendment to the by-laws made in 1913 was seized upon, although the same majority held an annual meeting in February, 1915. Overton's request that such meeting be held and directed elected was refused, as was his request for a special meeting to be called at which all defects in this amendment could be cured by the joint vote of the majority and minority stock (771,772).

(b) Conflicting Evidence.

No attempt has been made by the appellants to impeach the testimony or the honesty or integrity of either or any one of the witnesses on behalf of complainants.

In the appellants' brief an attack is made upon the testimony of Kniffin, Gardiner and Herger. It is asserted that the witness Kniffin was an unre-

liable witness, uncertain and vague as to his dates and time and place of occurrences. A fair reading of Kniffin's testimony, commencing on page 948 of the transcript, discloses the facts, that Kniffin was a scientific and skilled milling engineer who designed the cyanide plant for which so much credit is assumed by appellants in their brief. His testimony as to his arrival at the mine and his instructions relative to designing and making the drawings and working plans is clear and convincing; also the dates when he completed the plans and was ready to proceed with the construction of the mill itself, when he was informed by Gleim in the early part of January of the shortage in the company's funds. The testimony of Overton shows that Kniffin was the man who communicated the fact of the Osborn shortage to him (616). It is also clear from Kniffin's testimony that Wm. S. Noyes was at the plant during all this period, which is corroborated by all the other testimony in the case. Kniffin must have been informed some time prior to the 19th of January, because he waited several days after knowledge of the shortages, and on the 19th was instructed to go to work, and on the 20th commenced the actual construction of the cyanide plant by putting in retaining walls. This was the day that Noyes and Gleim went to El Paso to purchase machinery. The conflict of testimony on this point between Wm. S. Noyes and Kniffin as to the date of discovery of shortage is only one of the factors involved fixing the time of knowl-

edge by Noyes. The burden of proof is upon Wm. S. Noyes under all the facts of the case, and the testimony of Noyes being shown to be unreliable and positively false in other respects, the presumption may be indulged in that it was likewise false in this respect, particularly in view of all the connecting facts and circumstances of the case. Gleim, who followed Kniffin as a witness, did not contradict the testimony, nor was any attempt made to impeach the testimony of Kniffin. Appellants seek to discredit Kniffin's testimony in order to bolster up the theory announced by Wm. S. Noyes that he discovered the shortage on the 19th of January. All the facts of the case point in the other direction, that the shortage was known to Noyes before he ever went to the mine in December, 1912.

B. H. Lasky, a mining engineer, graduate of Stanford University and an experienced man, who had kept books, done surveying and underground work at the mine, and was familiar with the premises, facts, circumstances and conditions, is not mentioned anywhere in appellants' brief. His testimony precedes that of Kniffin (929-947). Lasky explained in detail the assaying system, the inaccurate factors entering into the methods used, which prohibited correct and conclusive results, and permitted the manipulations by Wm. S. Noyes, shown elsewhere in our brief.

The attempt is likewise made to discredit the testimony of Gardiner and Herger, asserting that it was vague and uncertain. The motive for this

attempted construction of their testimony is likewise made to bolster up the position that the minutes of the meeting of January 29, 1913, were correct, when as a matter of fact they did not reflect the truth of the occurrences. It is also asserted in appellants' brief (322) that Captain Overton threatened Gardiner and Herger. A reading of their testimony discloses that Captain Overton did not threaten them, but called their attention to the contents of the minutes, which they at once asserted to be false; that the occurrences therein set forth never occurred (444, 453, 454). It will be recalled that B. S. Noyes prepared the minutes of this meeting the day before it occurred, and they were written just as he prepared them (577-578).

Likewise in the brief there is a transmutation of testimony of Mrs. Overton (424) to the effect that Captain Overton did not even know of his stock holdings. The record discloses by the testimony of both Captain Overton and Mrs. Overton that they were desirous of knowing how much stock the different members of their family owned (635). No attempt is made to impeach their testimony or discredit the same in the brief. No contradictions can be found, and no improper statements or falsities attributed to their testimony. Both were reliable, and showed fairness, openness and willingness to answer on any matters and without any attempted concealment.

Turning now to the principal witnesses on behalf of defendants:

Osborn, although subpoenaed by the complainants, failed to appear.

William Cleveland is a director of the Marfa National Bank. He was such in 1912. The bank obtained the company bank account, received the collateral stock of Noyes taken from Osborn in December. The company's deposits in said bank in 1915 were $269,750 (comp. ex. 19, p. 6).

Benton Bowers profits continuously from the company business. He is now contracting for the company, although living in Oregon. He split profits with Wm. S. Noyes for years.

E. M. Gleim, the superintendent, who was at all times under the control of Wm. S. Noyes. He had his pay raised by Noyes, in January, 1913, from $250 to $350 per month, and again in August, 1913, to $450 per month. This made the cost of superintendence $900 per month, salaries of E. M. Gleim and Wm. S. Noyes, to do work which Wm. S. Noyes formerly did alone when at the mine. Could the actions of a superintendent under Wm. S. Noyes' control be conducive to the interests of the minority stockholders, or those of Wm. S. Noyes?

Peat admitted he did not tell the truth to Captain Overton or Mrs. Overton. That he felt he did not have to do so (893). He likewise admitted being a dummy for years. Nevertheless he was paid a salary of $270 per month for services for which $75 was ample.

Miss Doherty represented Mrs. Willis. She admitted she knew nothing about the corporation

books nor the business of the company, and put the remaining 31,956-2/3 shares of stock into the voting trust to give Wm. S. Noyes control (819).

B. S. Noyes, who manipulated in San Francisco while his brother was manipulating in Texas; who received the telegrams and letters and replied thereto; who prepared the minutes of the January 29th meeting in advance; who directed Osborn to adopt the lease because his brother had ordered it; who prepared the bonus resolution which defendants now say has a different meaning from its plain import; who participated in the cutting up of the Osborn stock, and received 5000 shares from Mrs. Willis; who says he is his brother's errand boy; whose letters as president to the complainant Overton and to the superintendent at the mine show his disregard of the rights of minority stockholders; who participated actively in the concealment and withholding of records and suppression of evidence; who gave direct orders to the superintendent to refuse complainant Overton access to to the books in Texas; who personally profited by a salary of $1800 per year.

Wm. S. Noyes, whose designs and manipulations resulted in his domination of the entire board of this corporation. Who secured all of the Osborn stock for himself and brother, and by taking advantage of the reliance placed in him by Mrs. Willis, had her stock placed in his control by a voting trust to run for 5 years. Who absorbed the entire corporation contemporaneously with the ac-

quisition of Section 5, through the Osborn shortage, and all without the expenditure of any money of his own. Who has acquired this corporation, with no debts in 1912, and has manipulated so the books now show a heavy indebtedness to him. He has been connected with the company for over 30 years. He knew all the facts. He himself testified that his position did not change after he went on the board of directors, that it was a change in name only (652). He raised E. M. Gleim's salary to $350 per month, contrary to the by-laws before he was a director (p. 28 appendix this brief).

He denied the company spent any money on account of the purchase of Section 5 (184, 186); the records show it did. He denies the bonus resolution means what it says, although he was present and explained it when it was passed (750). This resolution says he had spent large sums of money in getting the lease, and would continue to render services in securing a continuation of the same, all of which is untrue. In November of the same year he cancelled the lease without 30 days' notice required (475). He says that the payments provided for in the bonus resolution intended to approximate and did approximate one-half the net profits from Section 5 (711, 179, 216, 217); then he must have been sure before February 15, 1913 that the total net would be $90,000 by August 15, 1913. He contradicts this by claiming that when he bought it he did not know the value of Section 5 (183, 214). At one time he says it

was a hazardous and speculative enterprise; then that it was good for $90,000 profit in six months. He claimed that he loaned Osborn $10,689.75 from his own funds (753); yet when pinned down he admitted the "$11,000 forthwith" was voted for that very purpose (753). His lease of November 19, 1913, says Section 5 was to be worked with no investment of capital by the Presidio Mining Company (492). He admitted that the Presidio Mining Company under his management did spend its own capital for development work of Section 5 (193, 194, 762, 763). He says he had to buy Section 5 in December without adequately or at all examining the same (213, 214); yet his testimony shows he made a careful examination, including assays of stope 13, all of which was paid for by the company (686, 687, 764). He says the purchase of Section 5 was refused by the directors in December, 1912 (214). These were Gardiner, Herger, Fish, Osborn and Peat. Gardiner and Herger say it was not offered. Osborn and Peat told Capt. Overton they did not know when it was offered (586, 587). Gardiner and Herger knew nothing about the ownership of Section 5, nor of the Osborn shortage, until called to their attention by complainant Overton in October, 1915 (444, 454). He also avers that while he did not offer Section 5 between January 25th and November 19th, 1913, he did offer it prior to January 25, 1913 (178). He testified later that he did not offer it to directors, but "colloquially" to Osborn and Mrs. Willis (both

under his control) after his return from Texas in February, 1913 (692, 765). He stated he was so familiar with Section 8 that he could live in San Francisco and superintend operations in Texas by occasional visits, and be worth $450 a month to this company (203); he says he operated as superintendent Section 5 for years (182, 212); that Section 5 was similar in character to Section 8 (212); he then attempted to prove the purchase of Section 5 hazardous because he did not know its geology (182). He claimed his connections with "business" interests in Shafter ceased in the nineties (731); when confronted with his own answer (773) he admitted he was wrong. He received a commission from the E. G. Gleim Company for collecting miners' store bills (730, 734). He testified the only mercantile establishment he was interested in was the Benton Bowers business (773); when finally pinned down, he admitted receiving moneys from the mine boarding house (773, 774). He admitted that in March he informed the Overtons he was sorry he had bought Section 5; that he had purchased the same for sentimental reasons (728); the records show that on that date he claimed to have drawn $36,414.00. He claimed it was his practice to destroy letters, even on company business (783, 784); yet when occasion arose during his testimony he produced voluminous data worked out to the minutest detail and carefully collated over years of time.

(c) The $3500 Transaction.

In the trial court defendants admitted concealing the Osborn shortage of $10,689.75 by not entering the deposit of $5000 February 25, 1913, and of $5689.75 March 1, 1913. They admitted this only when forced to do so after complainants' discovery of this embezzled sum; indeed, complainants accused all defendants excepting Peat of participating in the benefit of the bonus, but defendants made vehement denials of this, and averred in unequivocal terms that they not only had never done so, each for himself, but each averred that Wm. S. Noyes was the sole beneficiary therefrom. Wm. S. Noyes himself positively averred he alone received all of the benefits of the bonus.

It was essential to the defense to pretend that Wm. S. Noyes discovered the Osborn peculations after December, 1912, when he acquired the 28,607 shares of Osborn's stock; it explains why defendants have been so insistent in averring and so emphatic in their testimony during the trial, in attempting to conceal the fact that they not only had full knowledge of additional Osborn peculations, but that they had themselves actively concealed them on September 6, 1913, by making or permitting to be made false entries in each and all of the money books of the company (376, 377, 395, 396, 399, 400, 401, 402).

Acknowledgement of the falsity of these entries is made in Reply of Defendants to Complainants' Answer to their objections to the appointment of a

receiver, sworn to by B. S. Noyes on February 11, 1918, as follows (414, 415):

"That early in September, 1913, John W. F. Peat called the attention of defendants Wm. S. Noyes and B. S. Noyes to the fact that the cash book of the Presidio Mining Company contained duplications of salary paid to L. Osborn and other matters chargeable to said Osborn, and, thereupon, said Wm. S. Noyes and B. S. Noyes sent for the said Osborn and the fact was developed that the further sum of $3385 appeared to be properly chargeable to said Osborn and the said Osborn was then and there informed that said sum must be forthwith made good to said company, and that Wm. S. Noyes would lend the said Osborn the money wherewith to make said sum good, but that it would be just as well to assume an even $3500 in order to be sure that said company received all its dues.

That on or about the 6th day of September, 1913, said Wm. S. Noyes delivered to said Osborn a receipt acknowledging the payment by Presidio Mining Company to Wm. S. Noyes of the sum of $3500 for ore delivered from said Section 5 and told the said Osborn to account for the receipt of said $3500 by the company in some proper manner upon the books. That thereupon, the said Osborn made the entry in the cash book of the receipt of $3500 from "Sundry Receipts", as set forth and shown on Exhibit 9, attached to said affidavit. That said entry was not a false entry, but truly set forth the fact that the company had received $3500. That in posting the said item to the ledger, the said Osborn, whether by accident or otherwise, erroneously posted the same to an account in the ledger entitled "Sale of Quicksilver, Supplies, etc.", instead of to the account of "Profit and Loss", where said items should have been properly posted. That thereafter and having appar-

ently discovered said error in posting, the said Osborn made the journal entry set forth in Exhibit 10 attached to said affidavit, wherein and whereby the erroneous ledger credit above referred to was neutralized by a debit entry in the ledger to that account of sale of quicksilver, etc., and Profit and Loss was credited with the sum of $3500. That none of said entries are false or fraudulent, but were properly made, and the effect of said transaction and of said entries was to restore to the said company said sum of $3500 and fully and completely make up and restore said shortage. That one of the functions of a journal is to correct errors which are inevitable in every business, and the journal entry above referred to was proper and correct."

B. S. Noyes testified in the trial court (378, 405):

"Of that $11,000 was gone—to be exact, $10,689.75",

and further testified as follows (406, 378):

"Q. You have kept several sets of books and do keep books at the present time?

A. I either keep them or they are kept under my direction. I have in the past kept books.

Q. You yourself have checked the books of the Presidio Mining Company since the time you became president?

A. And from before that time—all of the existing books, I have checked them with my own hands.

Q. What can you state as to the condition of those books from such an examination?

A. They are correct and in balance."

This testimony was given during the trial of the case in March, 1916, and the reply of defendants to complainants' answer to their objections to the

appointment of a receiver, quoted above, shows that, despite his testimony that the books were correct and in balance, and that the Osborn shortage was $10,689.75, he at the time he was testifying knew that on September 6, 1913, nearly three years before, he assisted in the covering up of $3385.00 shortage. These admissions of B. S. Noyes were forced from him by developments after the trial of the case, and are in answer to an affidavit of W. S. Overton re answer to defendants' objection to appointment of receiver, dated January 31, 1918 (373-406).

Following a letter from Klink, Bean & Company concerning certain irregularities appearing upon the company's books (379, 380) Captain Overton on September 26, 1916, wrote a letter to the directors of Presidio Mining Company, as follows (381):

> "It is admitted that Osborn made away with $10,689.75. That has no connection with this $1800.00. My investigation has found false addition, and it looks to me very much as if someone had made away with the $1800.00 in question. That is the reason I request the company have Klink, Bean & Company continue the investigation, because as a stockholder I wish to know if this $1800 was stolen from the company, and if so, who did it and by what means it was concealed. I shall raise this point at the annual meeting of the stockholders on October 2nd."

A purported explanation of this $1800 item was made in a signed statement to the stockholders of the Presidio Mining Company, as follows (382-384):

"Therefore, it appears to be the fact that $1800 has been abstracted by means of overpayments to the draft account and an attempt made to cover it up by means of the journal entry referred to by Klink, Bean and Company. The $1800 has not been posted to the credit of draft accounts, but $900 has been interpolated in pencil on ledger, page 35, and $900 more added to the credit footing on ledger page 86.

An effort should be made to recover this money, but it is evident from the books that the matter was long ago outlawed and occurred before any of the present board became a director of the company.

Yours truly,

B. S. Noyes,
Wm. S. Noyes,
J. W. F. Peat,
Directors."

This $1800 was part of the admitted $3385 embezzlements covered up by defendants September 6, 1913, by means of the $3500 entry. Hence the statement that

> "An effort should be made to recover this money",

is an attempt to deceive the stockholders. Only when forced to do so by the Klink, Bean investigations have defendants made this damaging admission.

The Klink, Bean report dated January 22, 1917, states (387-390):

> "Cash Book entry September 30, 1913...$3500.00
> (On this date there was apparently received the sum of $3500, but as there is no corresponding deposit in the bank it was not in actual cash.

Under date of September 6th, a disbursement to W. S. Noyes is entered of $3500, but for which no check was drawn against the bank account. It is manifest that these are offsetting entries, the result of which is finally a charge to Mining Lease Account, but without an actual cash disbursement.) * * *"

Page 393 of Transcript shows the following receipt:

"San Francisco, Sept. 6, 1913.

Presidio Mining Co. to Wm. S. Noyes, Dr. Received from Presidio Mining Co. Thirty-five Hundred Dollars on account of lease of Section 5 per contract $3500.00

Paid.

Wm. S. Noyes."

This false receipt runs through the books as follows (376):

Cash Book # 1, p. 100. Sept. 30, 1913, Sundry Receipts received this day..... $3500 (396)
(Refers to p. 133 Ledger.)

Journal # 1, p. 107. Oct. 6, 1913, Sale of Quicksilver, Sundries, etc. To Profit & Loss..... 3500 (399)
(Refers to p. 133 Ledger)
(" " p. 50 ")

Ledger # 1, p. 133. Sale of Quicksilver, Sundries, etc., Account, Sep. 30, 1913. By Cash..... 3500 (400)

Ledger # 1, p. 50. Profit & Loss Acct. Oct. 6, 1913. Sundries, Sales, etc..... 3500 (401)

Cash Book # 2, p. 3. Sept. 6th, 1913.
By Mining Lease. Wm. S. Noyes, on acct. of contract for lease of Section 5, Block 8 H. & T. Ry. Survey Presidio Co., Texas..... 3500 (395)

Wm. S. Noyes before the trial court March 22, 1916, testified that he had received since January 31, 1913, to December 31, 1915, $63,000 plus in cash, in addition to his salary from said corporation (377). This said $3500 so receipted for is included in said sum, and was known by him at the time of his testimony to be untrue. Noyes' motive in concealing this material matter was to conceal the further shortages of Osborn. Had he told the truth either as a witness or in his pleadings, the trial court would have learned of the other embezzlements of Osborn, so well known to Noyes and the other defendants, and by concerted action concealed from the court in their answers, and by Wm. S. Noyes and B. S. Noyes by their testimony.

The averments of all the defendants are likewise emphatic that not one of them participated in the bonus except Wm. S. Noyes. Complainants accused the defendants with having participated in the bonus, and defendants B. S. Noyes, L. Osborn, John W. F. Peat in their answer of October 11, 1915 (122, 123), denied that any of them

> "received a portion of the sums paid to Wm. S. Noyes under the provisions of said resolution, but aver that all of said payments were made to Wm. S. Noyes individually, for his own benefit. * * * These defendants, each

for himself avers, that they are not interested in Section 5, either directly or indirectly, and that they have not been paid or have received any of the profits thereof paid by said Presidio Mining Company to the said Wm. S. Noyes."

Wm. S. Noyes' answer of the same date, viz., October 11, 1915 (188, 189), likewise denies that any of the defendants other than himself

> "received a portion of the sums paid to him under the provisions of said resolution, but avers that all of said payments were made to him individually, for his own benefit."

The Klink, Bean audit above referred to shows that Wm. S. Noyes not only did not receive for his own sole benefit the $3500, but did not receive it at all.

Wm. S. Noyes also, in answer to Supplemental bill, dated March 16, 1916, admits (247, 248):

> "that under said resolution, in the month of February, 1913, there was paid to this defendant from the company's treasury the sum of $11,000 in two checks; one on February 24th for $6000, and one on February 28th for $5000. Admits that he deposited said sums of money to his own credit and that he then and there drew his own personal checks covering the amount of the shortage denominated the "Osborn shortage" of $10,689.75, which said checks were cashed by L. Osborn, who, in company with and under the eye of B. S. Noyes, the brother of this defendant, then redeposited said money to the credit of the Presidio Mining Company. Admits that no entry of the redepositing of said money to the credit of the Presidio

> Mining Company was made in the books of the corporation."

B. S. Noyes, L. M. Doherty, John W. F. Peat and L. Osborn (269) make this same admission in almost identical words. That all knew of these transactions is proved by further averments of each of these defendants (248, 270) as follows:

> "admit that all of the directors of said Presidio Mining Company, to wit: John W. F. Peat, L. Osborn, B. S. Noyes, L. M. Doherty and W. S. Noyes, knew of said acts and never objected to the same, but allowed the said moneys of the said corporation to be used as herein set forth."

Wm. S. Noyes admitted under cross-examination at the trial (753):

> "The company paid me $11,000 from its treasury under the so-called bonus resolution, so as to enable me to make good this shortage to the company."

The averments of none of these defendants regarding the Osborn shortage reflected the truth in stating positively that no one of the defendants participated in any of the bonus; the testimony of B. S. Noyes that the books were correct and in balance was known by him to be untrue; Wm. S. Noyes gave a false receipt September 6, 1913, and the books were falsified through the fictitious entries of $3500 as going out of the treasury to Wm. S. Noyes and coming into the treasury from sales of quicksilver, etc.; the letter to the stockholders of September 30, 1916, stating that an effort should be made to recover the $1800 shortage, signed by

Wm. S. Noyes, B. S. Noyes and John W. F. Peat, was known by them to be false at the time, as they had more than three years before concealed said shortage, and after discovery of the same maintained that it was made good then.

It was vital to the case of defendants to have these facts concealed, for complainants were stoutly maintaining in the Federal Court that Noyes knew of the Osborn shortages before January 19, 1913. The witness Kniffin testified he knew before this date; that Gleim had informed him; the Willis letter shows plainly

> "This is the second and more serious instance of this in the history of the company" (539).

These other embezzlements and concealments prove what Wm. S. Noyes referred to in this letter dated January 23, 1913,—prove conclusively that January 19, 1913, was not the date of his earliest knowledge of Osborn's peculations; prove that the transfer of 28,607 shares of Osborn's stock in December, 1912, was not without excellent reason; prove that Wm. S. Noyes had acted vigorously when he learned from Gleim that Section 5 was on the market in November, 1912.

IX.

AGENCY OF WM. S. NOYES.

We have heretofore adverted to the relations existing between the Presidio Mining Company, the Silver Hill Mill & Mining Company, and Wm. S.

Noyes, and the triangular arrangements made between said parties in 1912-1913. We also have adverted to the relations existing during the same period between Wm. S. Noyes, Osborn, Mrs. Willis and Miss Doherty concerning the manipulations of the Presidio Mining Company stock. We also have dwelt upon the facts concerning the acquisition of Section 5 by Noyes, his management of the corporation after securing control of Section 5, and the majority stock through the biddable majority, the assaying methods and dollar differential, his derivation of all the profits from the enterprise, together with his profiteering in Texas.

Under this state of affairs, facts and circumstances, the rules of law applicable are clear. An agent, or one standing in the confidential relation Wm. S. Noyes bore toward the corporation and its stockholders and the several parties precludes his deriving benefits for himself under all the facts and circumstances.

The law touching agency under similar facts and circumstances involved in this case, is dealt with in the following citations:

2nd Ed. Mechem on Agency, Vo. 1, Secs. 1188, 1189, 1588, 1589;

2 Corpus Juris, 692;

Hofflin v. Moss, 67 Fed. 443;

Western States Life Ins. Co. v. Lockwood, 166 Cal. 191;

Gardner v. Ogden, 78 Am. Dec. 207.

It is the duty of the agent to account for his profits in addition to his salary, unless there is an agreement to the contrary.

U. S. v. Carter, 217 U. S. 305-310;
McKinley v. Williams, 74 Fed. 95;
Northern Pacific R. Co. v. Kindred, 14 Fed. 77;
Gardner v. Ogden, 78 Am. Dec. 207;
2 C. J. 697.

As to duty of the agent generally, see

U. S. v. Carter, 217 U. S. 305;
Wickersham v. Crittenden, 93 Cal. 29;
Western States Life Ins. Co. v. Lockwood, 166 Cal. 191;
Moore v. Building Assn., 45 S. W. 974.

As to the California law touching on the confidential relations of an agent, see

Civil Code, Sec. 2315. Authority of agent.
Civil Code, Sec. 1985. Everything an employee acquires in addition to his salary belongs to his employer. Construed in Burns v. Clark, 133 Cal. 638.
Civil Code, Sec. 2020. An agent must use ordinary diligence to keep his principal informed of his acts during his agency.
Civil Code, Sec. 2223. Involuntary trustee.

Civil Code, Sec. 2224. Gains made by fraud or violation of trust.

Civil Code Sec. 3517. No one can take advantage of his own wrong.

At the very time when said Section 5 was acquired, the original lease made, and the control of the corporation acquired by Wm. S. Noyes, he was the company's confidential employee, servant, superintendent, agent, director and officer, on whom all relied, and he should have measured up to his obligations.

A case showing to what extent the Supreme Court of the United States has gone where the confidential relation exists is illustrated in the suit of Strong v. Repide, 213 U. S. 419, in which the controlling owner of company stock was also the sole manager and in possession of all facts and information relative to the company business. The suit involved a portion of the Friar lands in the Philippine Islands. The United States government was negotiating for a purchase of these lands, including those of this particular company, managed by defendant Repide. Mrs. Strong owned 800 shares of the stock. If the lands were sold to the government the stock would be valuable. If not sold it would be practically worthless. Repide, knowing the conditions, and that on his decision to sell the stock would be valuable, purchased the stock through a broker from the agent of Mrs. Strong for about one-tenth its value. Repide concealed the information from the agents. It was held

that such a confidential relation existed as amounted to fraud to conceal his knowledge from the seller's agent. The court, after discussing the various decisions touching the ordinary relations between the directors and shareholders of a business corporation, and as to whether or not a fiduciary relation existed between the said parties, held (p. 431):

> "These cases involved only the bare relationship between director and shareholder. It is here sought to make defendant responsible for his actions, not alone and simply in his character as a director, but because, in consideration of all the existing circumstances above detailed, it became the duty of the defendant, acting in good faith, to state the facts before making the purchase. That the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak. He was not only a director, but he owned three-fourths of the shares of its stock, and was, at the time of the purchase of the stock, administrator general of the company, with large powers, and engaged in the negotiations, which finally led to the sale of the company's lands * * * to the Government at a price which very greatly enhanced the value of the stock."

Again (p. 432):

> "The inference is inevitable that at this time he had concluded to press the negotiations for a sale of the lands to a successful conclusion, else why would he desire to purchase more shares which, if no sale went through, were, in his opinion, worthless, because of the failure

> of the Government to properly protect the lands in the hands of their then owners?"

Approximately three months after the purchase of this stock Repide re-sold the same for about ten times what he had paid. On page 433 the court says:

> "After the purchase of the stock he continued his negotiations for the sale of the lands, and finally, he says, as administrator general of the company, under the special authority of the shareholders, and as attorney in fact he entered into the contract sale December 21, 1903. The whole transaction gives conclusive evidence of the overwhelming influence defendant had in the course of the negotiations as owner of a majority of the stock and as agent for the other owners, and it is clear that the final consummation was in his hands at all times. If under all these facts he purchased the stock from the plaintiff, the law would indeed be impotent if the sale could not be set aside or the defendant cast in damages for his fraud."

This decision illustrates the principle as affecting agency we are contending for in this suit. Wm. S. Noyes was the only man in the confidence of the corporation. Mrs. Willis relied implicity upon him. Osborn was entirely dominated by him. No other person knew anything of the corporation affairs, nor of the negotiations. On Noyes alone depended the success or failure of the company.

To paraphrase in the instant suit we might say, the concealment of his intentions by Noyes was not a mere inadvertent omission, an omission without any fraudulent or deceitful intent, but was a studied

and intentional omission to be characterized as part of the deceitful machinations to obtain the control of Section 5 and Section 8, without giving any information whatever as to the results of his efforts.

The whole transaction gives conclusive evidence of the overwhelming influence Wm. S. Noyes had over the other defendants as his nominees, and as the dominant factor with the majority stock under his control (reached by getting Osborn in his power), and finally consummating his ambitions to control Section 5 and Section 8, which he had until removed from power, with all their possibilities of profit to himself. All shown by his receipts of money amounting to $59,836.20 in addition to salaries, and an alleged claim of approximately $80,000 at the time of the submission of this case for decision in August, 1916.

If under all these facts Wm. S. Noyes obtained Section 5, the control of the Presidio Mining Company, and operated the entire property to his sole advantage, with his paid dummies and tools as his officers and biddable directors, the law would indeed be impotent if the entire transactions complained of could not be set aside as constituting fraud of the most vicious kind.

X.

SALARIES.

The interlocutory decree directs that an accounting be had as to the salaries paid to the officers of

the corporation, including the superintendent Gleim; that the Master hear testimony on behalf of the complainants and defendants in the suit and report his findings to the court (430, 433, 434).

Pages 376 to 399 of appellants' brief are devoted to a discussion of this subject. The finding of the trial court has been only that the fairness or unfairness be ascertained, and that the finding of the master be made thereon.

The master on the accounting might proceed upon one of two theories:

1. That where defendants have been found guilty of fraud, they may be denied any salaries whatsoever;

2. That notwithstanding a finding of fraud against the defendants, reasonable compensation might be paid them for services.

Appellants appear to be under the impression that because they controlled the majority stock of the corporation they could pay any salaries they saw fit. We fail to see where it was necessary to have a general manager in San Francisco at $450 per month, and likewise a second executive in the person of a president drawing a large salary of $150 per month, when the company was alleged to have had an efficient and able superintendent at the mine. We likewise fail to see where it was necessary for Peat, a former dummy president, to have had created for him the office of assistant secretary at $25.00 a month, when the embezzler Osborn was continued

at a monthly salary of $300 for services worth not over $75 a month.

We submit that the asserted right of these appellants to pay themselves the salaries drawn is not sustained by the evidence nor by authority.

In a case where directors who were also the majority stockholders holding five-sixths of the capital stock paid themselves exorbitant salaries, a New York court held:

> "Simply because they happened to hold a majority of the stock, which enabled them to elect themselves directors, and that they constituted all of the directors, gave them no right to vote themselves salaries. In doing so they were not occupying that impartial position which the law requires; in other words, self-interest might induce them to act to the prejudice of the other stockholder. Salaries cannot be voted under such circumstances, and, when so voted and paid, the money can be recovered back for the corporation, at the suit of an aggrieved stockholder."

> "It is also urged on the part of the appellants that the plaintiff failed to prove the salaries voted were excessive, and that the bad faith of the directors cannot be presumed. The suggestion is based upon an erroneous assumption as to the precise relation in which the defendants, as directors, stood to the corporation. They occupied a position of trust, and, when the fact appeared that they had voted themselves salaries by a resolution in which they all joined, then they were put in the position of trustees dealing with themselves, to their own advantage, with respect to their trust. In such case the presumption is that they acted in their own interest, to the prejudice of the

corporation, and the burden was upon them to overcome such presumption. Sage v. Culver, 147 N. Y. 241, 41 N. E. 513. This they entirely failed to do. A minority stockholder in a corporation has nothing to say about the management of its business and affairs, because the directors are elected by the majority. Notwithstanding this fact, a minority stockholder has some rights which the directors are bound to respect, viz., that the property of the corporation shall not be stolen or misappropriated under the guise and pretense of salaries of officers, and whenever such attempt is made, and the act by which it is attempted to accomplish that result is reviewed by a court of equity, it will not hesitate to compel the directors to do what they ought to have done, by way of restitution."

Davids v. Davids, 120 N. Y. Supp. 352.

See also

Strause v. Sylvester, 6 Cal. Unrep. Cas. 799; 66 Pac. 660;

Boothe v. Summit Coal Min. Co., 104 Pac. 210; 19 Ann. Cases, note p. 1260;

Schaffhauser et al. v. Arnholt etc. Brewing Co., 11 Amer. & Eng. Ann. Cases, 772, 773;

Wickersham v. Crittenden, 93 Cal. 17;

Brown v. Valley View M. Co., 127 Cal. 630-637;

Bassett v. Fairchild, 132 Cal. 653;

Loan Assn. v. Steinmetz, 29 Pa. St. Rep. 534;

Brown et al. v. DeYoung et al., 47 N. E. 863;

Williams v. McClave, 148 N. Y. Supp. 93-95;

Bosworth v. Allen, 85 Am. St. Rep. 667;

McNulty v. Corn Belt Bank, 45 N. E. 954-961;

Jacobson v. Brooklyn Lumber Co., 76 N. E. 1075-1079;
Miller v. Crown Perfumery Co., 109 N. Y. Supp. 760;
Jones v. Morrison, 16 N. W. 854-861;
Green v. Felton, 84 N. E. 166-170;
Gardner v. Butler, 30 N. J. Eq. 724-725;
Copeland v. The Johnson Mfg. Co., 47 Hun 235 (N. Y. Supreme Ct. Rep., Vol. 54);
Fougeray v. Cord, 24 Atl. 502;
Harrison v. Thomas, 112 Fed. 27;
Harder v. Sunset Oil Co., 56 Fed. 51;
2 Thompson on Corporations, Sec. 1762.

XI.

PRESUMPTIONS ON DESTRUCTION AND CONCEALMENT OF RECORDS AND ATTEMPTS TO WITHHOLD INFORMATION FROM COMPLAINANTS.

We have elsewhere discussed the attitude of defendants in concealing facts, falsification of records, destruction and disappearance of documents and files, and the wilful refusal, particularly on the part of B. S. Noyes, president, to permit complainant Overton to obtain access to the books in Texas. We have likewise called attention of the court to the disappearance of all the telegrams and letters pertaining to the transactions had between Wm. S. Noyes and this company, its officers, and his brother in December, 1912, and January, 1913 (app. 34).

We believe, as to the contents of the documents and telegrams, letters destroyed or concealed, the

false entries made in the books, the withholding of information which might be used as evidence against the defendants, the persistent attempts to prevent access by complainants to the records, the refusal to allow inspection of the books in Texas, and the general opposition to acquisition of full information by complainants, as attempted and carried out by the defendants, invokes the rule that the most unfavorable presumptions should be indulged in against said defendants, and the most favorable presumptions indulged in as affecting complainants, under the maxim *"omnia praesumuntur contra spoliatorem"*, for

> "if a man by his own tortious act withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted."
>
> 1 Smith's Leading Cases, 9th Ed., p. 638.

We deem the subject of sufficient importance to present the following authorities:

English Decisions:

Gray v. Haig, 20 Beavan 219; Reprint 52 Eng. Rep. 587;

Dean v. Thwaite, 21 Beavan 621; Reprint 52 Eng. Rep. 1000;

From Lord Melville's Trial, 29 How. St. Tr., 1194-1195; cited in note to Hay v. Peterson, 34 L. R. A. 590;

Lupton v. White (15 Ves. Ch. 432, 439); Reprint 33 Eng. Rep. 817;

Armory v. Lelamirie, 1 Strange 505.

American Doctrine:

Cartier v. Troy Lbr. Co., 14 L. R. A. 470;
Hay v. Peterson, 34 L. R. A. 581;
Riggs v. Penn. & N. E. R. Co., 16 Fed. 808;
Pacific Coast S. S. Co. v. Bancroft & Whitney Co., 94 Fed. 198;
Kirby v. Tallmadge, 160 U. S. 379, 382.

California Decisions:

Bagley v. McMickle, 9 Cal. 446;
People v. Hurley, 57 Cal. 146;
Fox v. Hale & Norcross S. M. Co., 108 Cal. 415;
Leese v. Clark, 29 Cal. 665, 669;
C. C. P. 1963, subdivision 5.

Texts:

16 Cyc. 1058; 6, (b. c. d.);
Vol. 4, Wigmore on Evidence, Secs. 2524 (278), (285), (291);
Lawson Presumptive Evidence, 2nd Ed. 1899, Rules 22, 23, 24, 25 and p. 196;
Ency. of Evidence, Vol. 9, p. 958-962;
Ency. of Evidence, Vol. 13, p. 427;
Jones on Evidence (2nd ed.), Secs. 17-22.

XII.

ESTOPPEL.

We likewise believe it to be true in the instant suit that defendants, in view of their positive averments in their sworn answers relative to the own-

ership of stock by L. Osborn, and that Noyes acquired the stock in December, 1912, should not be permitted to press their claims in any way that Noyes was the owner of any of the Osborn stock from the year 1907.

> "The rule requiring consistency of action is not an arbitrary one, but is grounded upon the nature of courts of justice."
>
> Lilly v. Menke, 44 S. W. 732;
>
> Bigelow on Estoppel (6th ed.), p. 783.

> "Parties litigant are not allowed to assume inconsistent positions in court; to play fast and loose; to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt."
>
> Bensieck v. Cook, 19 S. W. 644.

XIII.

LACHES.

Appellants' brief (pp. 421-443) deals with this subject, although no exception on this ground is laid in the brief, nor do we find any reference thereto in the assignments of error. We have heretofore adverted to this question in our brief (p. 46), urging that the appellants have no right to be heard upon the subject. Nevertheless we answer appellants' assertion that laches exist.

The defense of laches is allowed, not as a punishment for the neglect of complainant, but to prevent inequity being done a defendant. It is only applied where a complainant with full knowledge

that his rights have been invaded has submitted to unconscionable delay, during which other rights have arisen founded upon his silence and acquiescence or detriment has been suffered. As is said in the case of

Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221-339:

> "Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted, and either of these cases and delay are most material. * * * Two circumstances always important in such cases, are the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy."

The rule governing laches was announced many years ago in the case of Michoud v. Girod, 4 How. 503:

> "In cases of actual fraud, courts of equity give relief after a long lapse of time much longer than has passed since the executors in this instance purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. * * * There is no rule in equity which excludes consideration of circumstances, and in cases of

actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, and within 30 years after it has been discovered or becomes known to the parties, whose rights are affected by it."

And in the decision of Cutting v. Woodward, No. 3152, decided during this term by this court, Mr. Justice Gilbert says:

"The appellant relies upon the defense of laches. The only assignment which brings that question before us is that the court below erred in overruling the motion to dismiss the complaint, one ground of which motion was that it appeared from the complaint that the plaintiffs therein were guilty of laches, in that the sale of stock complained of occurred in October, 1906, and the suit was not brought until February 19, 1913, 'by reason whereof the causes of action are barred'. This presents the question whether upon the allegations of the bill the delay in bringing the suit constitutes laches. The complaint alleged that the plaintiffs during all the times referred to therein were citizens and residents of the State of Illinois; that the appellant purposely, intentionally, and fraudulently concealed his fraudulent practices and the performance of said acts and doings from the plaintiffs and other stockholders by causing to be kept insufficient and inaccurate books of account and corporate records of the affairs of said company, and lulled the plaintiffs and other stockholders into seeming security by statements made by him that all the stockholders of the Trust Company should be jointly interested with him in all profits which might accrue out of any of his transactions with or pertaining to the business, property and affairs of the Trust

Company, and that he would hold the title of 1175 shares of stock of the Land Company in trust for the Trust Company, and that the plaintiffs were made to believe that the acts of the appellant so far as any of them were known to plaintiffs were for the best interests of the Trust Company and its stockholders, and that the appellant was honest in the performance of all such acts; that acting under such belief, plaintiffs made no careful investigation of the records and transactions of the appellant, and that they did not discover his fraud and fraudulent practices until on or about the month of January, 1913; that the appellant was the President and director of the Trust Company, and acted in a fiduciary capacity for and towards the plaintiffs. Taking these allegations to be true, they were sufficient we think to show prima facie that the causes of action were not barred. In *Bailey v. Glover,* 21 Wall. 342. Mr. Justice Miller said:

'In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.'

"In that case the allegations of the complaint were that the defendants kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge 'of the plaintiff, whereby he was prevented from obtaining any sufficient knowledge or information thereof until within the last two years.' In *Rosenthal v. Walker,* 111 U. S. 185, the court re-affirmed the rule that where it is sought to obtain redress against fraud concealed by the defendant, or which from its nature remains secret, the bar of the statute of limitations does not begin

> to run until the fraud is discovered, citing Bailey v. Glover, which case, said the court, 'has been often cited by this court but has never been doubted or qualified.' We followed and applied the doctrine of those cases in *Pickens v. Merriam,* 242 Fed. 363. In *Townsend v. Vanderwerker,* 160 U. S. 171, 186, it was said: 'The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether under all the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.' "

We have cited numerous decisions on this subject heretofore in our brief (pp. 38-40), to which we here refer as further authority on this subject.

It is attempted in appellants' brief to weave into this pretended ground of laches the entire history of the corporation from 1907 to 1915, in order to predicate thereon some appearance of right, and then on such asserted claim build a 22-page argument. The facts of the case are clear, that Captain Overton and all the other members of the family, and all the other minority stockholders, had always presumed the officials of this company to be honest. They had a right to rely on this presumption. Particularly did they have full confidence in Wm. S. Noyes up to the time of the discovery of irregularities on or about the first of April during the first visit to the mine in Texas by Captain and Mrs. Overton on their return home from San Francisco.

In this state, subdivision 4 of Sec. 338, C. C. P., announces that the statute of limitations in cases of fraud is three years from the time of discovery. The distinction between limitations and laches is clearly set forth in the case of Wills v. Nehalem Coal Co., 96 Pac. 535, heretofore cited, to the effect that if suit be begun within the period of time specified by the statute of limitations, the burden of proof of showing laches is on the defendant. If the suit be brought after the period specified by the statute of limitations, the burden of proof to explain laches is on the plaintiff in the case.

In the instant suit it develops that Captain Overton first became suspicious about the first of April, 1915, and as soon as he was able to return home, arrange his affairs, consult other minority stockholders, arrange for support, that he at once returned and began a thorough investigation, and within four months from the date of discovery had filed suit in the trial court. It likewise is a fact that two years, eight months after the commencement of the manipulations most seriously objected to by complainants, suit was filed and litigation was under way to right the wrongs complained of.

It has not been shown that any detriment resulted to the defendants or any one of them through the absence of earlier action on the part of complainants. The activities of Captain Overton began the instant he discovered anything wrong, and they have been vigorously pressed ever since. Through these efforts the business affairs, history and trans-

actions of the Presidio Mining Company during the time complained of and in years past was uncovered. Surely under these facts and circumstances, and considering the serious nature of charges made, the involved and complicated matters, the concealments practiced, and the existence of fiduciary relations, the defense of laches is untenable. To prevent the application of the remedies applied in the face of all this fraud, particularly on the part of Wm. S. Noyes, under the pretense that there has been too long a delay in bringing this suit, would be such an injustice as to shock the conscience of any man with ideas of rectitude. It would be putting a premium upon dishonest practices and fraud of the most vicious and malignant type.

XIV.

KLINK BEAN & CO. REPORT.

Appellants dwell at considerable length on the Klink Bean report, which they attempt to construe as favorable to their contentions. An unbiased reading will show that it is not. Klink Bean & Co. disapprove the system of stope assays, hold that the bonus and the dollar differential are both unfair, and that the ores from Section 5 were essential to continued operations of Section 8 (987, 988), and though appellants attempt to gloss over these opinions, the fact remains that they are the most vital matters concerned in the report. Klink Bean & Co. say that *assuming* that the Presidio Mining Com-

pany could not buy Section 5, the contract was fair enough *because* it could be terminated on thirty days' notice. How does this help appellants? We have shown and the trial court has held that Wm. S. Noyes was in complete control of the Presidio Mining Company, and could and did prevent the company from breaking this contract which Lasky has shown to be wholly iniquitous. This suit is not concerned with the details of bookkeeping, but with the basic principles of fraud.

Of importance:

> "I have taken the books and records of the company as presented to me by the officials having them in charge and have taken the figures found in those books and records for the basis of my computations" (Klink, 1009).
>
> "I took the figures which I found and which were given to me by the officials of the company" (Cooper, 1015).
>
> "I want you to note the nature of our examination; we took things as they appear on the books and compiled our report" (Cooper, 1023).
>
> "I had no means of determining whether Section 5 and Section 8 were worked to the best advantage" (Cooper, 1016).
>
> "I do not know anything about the actual facts of the acquisition of Section 5 by Wm. S. Noyes in 1912 or 1913. I do not know as to the conditions under which the various contracts and resolutions were passed and adopted by the board of directors" (Klink, 1010).

That these books were falsely kept is naively passed over by appellants, and in order to make use of the Klink Bean schedules based on these very

books, appellants have been obliged to suppress and substitute figures, as has been already pointed out.

Two questions propounded to Mr. Klink comprehend his views. Asked if he would buy ore on a basis such as it was purchased by the Presidio Mining Company, he stated (1010, 1011):

> "It would not be satisfactory to me."

Second, asked as an expert to place a value upon the services of a bookkeeper, he testified:

> "I am prepared to state what a reasonable salary for a bookkeeper to take care of the books in San Francisco would be; I should think about $75 would be about right" (1015).

Appellants have attempted to belittle this testimony of Mr. Klink by drawing a distinction between a secretary and a bookkeeper (brief, 383, 384, 385, 395). But they have themselves negatived this finely drawn distinction when they emphasize the fact of Osborn's being merely a clerk (brief, 120), and also where Wm. S. Noyes in his letter to Mrs. Willis says:

> "What I propose is as much for Osborn's protection as for yours and mine; he can keep the books but ought not to handle the cash, for this is the second and more serious instance of this in the history of the company" (539).

Obviously Mr. Klink meant $75 was sufficient for honestly kept books, not those kept falsely by an embezzler, with an assistant secretary who had as president signed the embezzling checks, and overlooked by B. S. Noyes, who permitted the omissions of entry and false entries (919).

XV.

INJUNCTION—RECEIVERSHIP.

1. General reply to appellants' brief on subject.

2. Reply to alleged financial conditions.

3. Authorities on injunction sustaining appellees' position.

4. Authorities on Receivership sustaining appellees' position.

1. General Reply to Appellants' Brief on Subject.

It is urged in appellants' brief (443-451) that no foundation existed for the application of injunctive relief. Pages 451-471 are devoted to a criticism of the alleged "expensive receivership". There is no foundation for such a statement as "expensive receivership", for there is no evidence in the record showing that the receivership is expensive, extravagant, or not justified. The receivership is justified, it is not expensive, and the company was never so efficiently managed nor producing such profits for all the stockholders as it is doing now.

It is further urged that there was no showing by the complainants that the defendants were not able to respond to a decree of the trial court, nor that any proof was adduced showing the insolvency of defendants. The evidence does not disclose anywhere any ability on their part to respond to the decree of the trial court, and no showing was made by them that they intend to abide by its decision. In partial substantiation of our statements we refer

to appellants' 471-page brief showing their determined resistance to the decrees of the trial court.

Appellants' pretended offer (brief, 447-449) to deposit in court the company funds, and assuming this prerogative after their conviction of gross fraud, is a most astounding and preposterous proposal. What right have they to assume and determine what the judgment against themselves is to be after the accounting, considering Section 5 accounts, thefts of Osborn, secret side profits of Wm. S. Noyes, salaries, directors' fees, interest on said moneys involved, to say nothing of attorney's fees, costs and expenses? The findings of the Master in Chancery have not been settled, nor has a final decree been entered. It may be that their entire holdings will not suffice to respond to the final decree, to say nothing of their possible continued manipulations. What might prevent disposing of all the Osborn stock to third parties if not impounded, as the facts at the time of the granting of injunction indicated they were about to do (291-300)? What might prevent the encumbering of Section 5, or disposing of it to third parties, by Wm. S. Noyes, if permitted to retain the title in his own name without any restrictions, and force complainants to initiate further protracted and expensive litigation either in the courts of California or Texas to quiet title to said property? What to prevent the attempted damage, destruction or ruin of the mine and plant by beaten, vindictive and desperate defendants, if permitted to remain in control of the company operations?

The past conduct of defendants as dominated by Wm. S. Noyes controlling the company, evidences an utter disregard for the rights of minority stockholders. How could a decree capable of complete enforcement be sustained with a control remaining in the hands of said defendants, with full and untrammeled power to attempt, if not actually to thwart and oppose every order of court made? A chancellor of the capacity, ability, training and experience of the trial court is not going to see his decree and orders nullified, nor even open the door for interference, by giving opportunity to the defendants in this suit found guilty of the acts and deeds complained of under the control and domination of Wm. S. Noyes, to thwart, block, or hinder their enforcement. The injunctions, decrees and orders appointing the receiver were right and should be affirmed.

2. Condition of Company January 24, 1918, as Reflected by Affidavit of B. S. Noyes January 28, 1918, Accompanying Defendants' Objections to the Appointment of a Receiver (360-369) Versus the Pretensions of Appellants' Brief, page 391.

An analysis of the financial situation discloses a startling condition, very different from what is pretended by appellants.

We have shown how appellants suppressed the assets reported in Klink Bean schedule 15, on pages 89, 90 of their brief, and likewise, on page 93 thereof, suppressed the liabilities in order to try to make the company appear impoverished in the so-called

"crucial period" of 1913, and to try to make it appear prosperous August 28, 1916.

On page 391 appellants, in their brief, have again suppressed liabilities in the table they present, which table they allege shows such a prosperous condition of the company on January 24, 1918, that the appointment of a receiver was in no wise necessary for the protection of any of the stockholders of the company.

This presentation to the court has been made by careful extraction of certain figures from the transcript (362, 363). A true rendition as presented to the trial court by defendants reveals an absolutely bankrupt condition of the company had Wm. S. Noyes been permitted to force his alleged claim. It was solvent only because of injunctions granted complainant December 28, 1915, restraining Wm. S. Noyes from drawing any further sums on account of his alleged one-half of the net.

As January 24, 1918, was indeed a "crucial period" and that of granting the receiver, we shall prove by B. S. Noyes' own affidavit (in which he made the best showing he could, since he was using it to base his objections to said receivership on the ground of prosperity of the company) that the company was insolvent except for the protection of the trial court.

We quote verbatim from appellants' brief (p. 391):

Cash and bullion in San Francisco	$63,912.03
Liberty bonds	25,000.00

Cash in Savings Bank, Marfa, Texas.	15,000.00
Cash in Marfa National Bank, Marfa, Texas	43,154.46
Mining supplies at Shafter Texas....	45,183.50
Permanent equipment since January 1, 1913	157,036.28
Total	$349,286.27

(365)

Less amount due William S. Noyes as one-half the net from Section 5. The record does not disclose this amount, but the best possible estimate seems to be $110,000.00

We contrast it with B. S. Noyes' sworn statement from which it was derived (362, 363, Transcript):

(1) In cash and bullion in San Francisco, the sum of	$63,912.03
(2) In Liberty bonds, the sum of....	25,000.00
(3) Cash in Savings Bank at Marfa, Texas, the sum of	15,000.00
(4) Cash in Marfa National Bank, Marfa, Texas, the sum of	43,154.46
(5) Supplies on hand at the mine at Shafter, Texas, as of January 1, 1918, the sum of	45,183.50

Making a total of net liquid assets of $192,249.99

From this literal rendition of B. S. Noyes' sworn statement we find:

Total liquid assets claimed	$192,249.99
Deducting January operating costs of	24,800.00
and the income tax claimed due (362,363)	50,000.00
Leaves liquid assets over liabilities made up of cash, bullion in transit and supplies, the sum of	$117,449.99

Appellants admit (brief, 391) that the "best possible estimate of the amount due William S. Noyes" is	110,000.
Leaving a total of cash, bullion in transit, mining supplies at Shafter, Texas, Net worth.....	$7,449.99*

So, from a Net Worth of $48,212.11 December 31, (1912, K. B. Sch. 15, 1008), the company has tobogganned to only an alleged Net Worth of $7,449.99 on January 24, 1918. From the famous overdraft of $3303.72 December 31, 1912, we find that on January 24, 1918, the company owed the miners and Wm. S. Noyes $37,733.51 more than its cash, bullion and bonds can pay except for the protection of the court.

There remains only the claim of "Permanent equipment since January 1, 1913, $157,036.28" (391 brief), upon which to base even a pretense of a claim of good management. These figures are just as misleading as those brought about by actual suppressions of figures representing assets or liabilities. Appellants try to leave the impression that they have expended $157,036.28 and that for it the company has a brand new plant, with new engines, new pumps, new everything, all with the paint unscratched; whereas a study of the items making up this sum (368,369) in said sworn statement as presented by B. S. Noyes show that the "Cyanide

* Of this Net Worth $45,183.50 were mining supplies (362,363) leaving a *deficit* of $37,733.51 cash, bonds and bullion in transit to pay outstanding obligations. Appellants in their brief state that one cannot pay bills with supplies.

plant $33,582.39'' built in 1913, is carried January 24, 1918, as if it had no old or worn parts. Indeed, we find the word "New" used in these tables as follows:

1914.	New Crusher at mine,	770.00
1915.	3 New classifiers,	9683.00
1917.	New hoist at South Shaft,	2986.80

So our machinery, like all other machinery (particularly mining) wears out. The brand new oil-burning engine of 1912 that placed the plant in a "most excellent condition" has also probably worn out, for the list of permanent improvements includes "oil engines in power house, $23,985.82".

B. S. Noyes, president of the Presidio Mining Company, making sworn returns to the United States Government on Presidio Mining Company income, and B. S. Noyes, defendant, presenting figures to this court, are two very different men. We quote verbatim from the United States income tax return sworn to on February 17, 1916, by B. S. Noyes, president, and John W. F. Peat, secretary, for the income for the year 1915 (Ex. 14):

Under "5(b) Depreciation...$11,875.10''

Itemized as follows:

	Cost.	Amount of depreciation this year.
"Mill,	$86619.45	8661.95
Rope tramway,	24772.30	2477.23
Tracks,	7359.25	735.92
Total,	118751.00	11875.10''

Therefore, since B. S. Noyes, president of the Presidio Mining Company, swears off a 10 per cent depreciation for one year on the cyanide plant, we will do likewise. Said table of B. S. Noyes (leaving out details) summarized reads:

1913,	installations,	$40,941.64
1914,	"	42,094.17
1915,	"	9,683.00
1916,	"	5,700.00
1917,	"	58,617.47
Total,		157,036.28

Taking ten per cent per annum depreciation, we arrive at a total depreciation of $47,220.16, leaving $109,816.12 as the present value of plant. This depreciation is more favorable to defendants' position than B. S. Noyes' own figures to the United States government, because for 1915 he swears off $11875.10 depreciation in value of plant, whereas applying the above method marks off only $9271.88 for said year. The $157,036.28 cost for installations becomes $109,816.12 on a presentation more favorable to defendants than B. S. Noyes presents to the government. Our mill has had five years' wear since 1913, and our ore reserves, which are the actual measurement of the life of a mine, have suffered five years' exhaustion as well. We have an old worn plant, empty ore cavities, not enough cash and bullion by over $37,000 to pay our alleged bills, but fortunately for the company, the trial court paid no heed to defendants' objections to the ap-

pointment of a receiver, but put one in charge of the company.

Why should Wm. S. Noyes and his tools, with no capital investment, get all the profits and the minority stockholders get an old worn out mill, empty ore pockets, empty coffers? Who can estimate what the company would have earned had the management been honest—and either their figures to the court are not honest, or the report to the United States government is not. Of this there can be no argument. The following are from the sworn income returns to the United States government, the affidavits being made by B. S. Noyes, president:

For year ending	Net Income	Loss	Indebtedness	Interest Paid	
Dec. 31, 1913	$7882.73		14,000.	68.36	(Ex. 12)
" " 1914		18105.78	26,000.	1392.79	(Ex. 13)
" " 1915	8334.20		61,553.40	366.28	(Ex. 14)

The foregoing table shows that for the years 1913, 1914 and 1915 B. S. Noyes reported to the federal government an actual loss of $1888.85. This should be presumed to be the truth, because sworn to by B. S. Noyes, an attorney and experienced in the keeping of books.

3. Authorities on Injunctions Sustaining Appellees' Position.

We have heretofore mentioned the two injunctions granted in the case:

* On note.....$1226.70	** On notes.....$304.71
"On overdrafts..... 166.09"	"Various advances from Selby Smelting and Lead Co. ..... 61.57"
Interest paid 1914...$1392.79	Interest paid 1915.....$366.28

First, dealing with Section 5 and preventing payments of money on Section 5 account to Wm. S. Noyes, directly or indirectly, or to any of the other parties in the case, and preventing the transfer or encumbering of said property;

Second, impounding the Osborn stock.

The rule concerning injunctive relief is well settled where questions of fraud are involved. It is an ancillary remedy, and while not to be lightly used, it is nevertheless within the discretion of the trial court to apply the remedy when facts warrant its application.

In Pomeroy on Equity Jurisprudence, it is said:

> "Sec. 1339. The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property, is really commensurate with the equitable remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests or claims, with respect to specific things, whether lands, chattels, securities or funds of money, or to relieve against mistake, or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate cannot arise; much less can it be the criterion by which to determine whether an injunction can be granted; for there is no remedy at law. Since the estate, interest, or claim of the complainant is purely equitable, it is exclusively cognizable by equity; and if its existence is shown, a court of equity not only has the jurisdiction, but is bound to grant every kind of remedy necessary to its complete establishment, protection and enforcement according to its essential nature.

Many breaches of trust are of such a nature that, if accomplished they would completely defeat the right of the beneficiary to the specific trust property. The equitable reliefs against mistake or fraud with respect to specific equitable property, and the equitable remedies of all kinds to enforce trusts, express or by operation of law, and fiduciary duties concerning specific property, and to enforce any other equitable estate, interest, lien, or right in or over specific property, would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer or encumbrance of such property, and all other modes of dealing with it which would prejudice the rights of the complainant, and prevent him from acquiring the title, or from enjoying his estate, or from enforcing his claim, or from receiving the full benefits of final relief.

"It may therefore be stated as a general proposition that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests or claims in or to specific property, *requires the aid of an injunction,* a court of equity has jurisdiction, and will exercise that jurisdiction, to grant an injunction, either pending the suit, or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights, and which would therefore interfere with and prejudice the ultimate remedies against mistake and fraud. The particular instances to which the doctrine is applied are almost numberless, and extend throughout the entire range of equitable remedies against mistake and fraud, or to

> enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, liens and primary rights in and to specific property of any kind or form * * *
>
> Sec. 1345. As has already been stated, an injunction will always be granted, if necessary, to protect, aid, or enforce any equitable estate, interest or primary right, or to secure and render efficient any purely equitable remedy. Among the most important instances in which this general doctrine is applied, in addition to those already mentioned, are the following: Against corporations and their directors and officers, to restrain acts which are illegal, *ultra vires,* or in violation of their fiduciaries."

The author cites numerous cases in support of the above, including the following cases involving the granting of injunctions "to restrain unlawful acts of directors or managing officers in violation of their fiduciary duties":

> Cannon v. Trask, L. R. 20 Eq. 669;
>
> Dowling v. Pontypool etc. R'y, 18 Eq. 714;
>
> Featherstone v. Cook, L. R. 16 Eq. 298;
>
> Mair v. Himalaya Tea Co., L. R. 1 Eq. 411;
>
> Carlisle v. South East Ry., 1 Macn. & G. 689.

In High on Injunctions (4th ed.), Sec. 1203, the author says:

> "The protection of the rights of shareholders in incorporated companies against the improper or illegal action of other shareholders, or of the officers of the company, is a favorite branch of the jurisdiction of equity by injunction. And it may be asserted as a general rule, that courts of equity may enjoin, in behalf of the stockholders of an incorporated company, any improper alienation or disposition of the

corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchise, as well as the improper management of the business of the company, or a wrongful diversion of its funds or from depriving plaintiff of his rights as a corporator."

In a note to the above are cited, among other cases, the following cases involving suits to enjoin the fraudulent and wrongful acts of directors and officers in the management of corporate property:

Sears v. Hotchkiss, 25 Conn. 171;

Harding v. American Glucose Co., 182 Ill. 551; 55 N. E. 577;

Bixler v. Summerfield, 195 Ill. 147; 62 N. E. 849.

In Ashton v. Dashaway Assn, 84 Cal. 61, Mr. Justice Sharpstein, after quoting from a Rhode Island decision as to the jurisdiction of equity in reference to the misappropriation of corporate funds, goes on to say (p. 67):

"In accordance with these principles, it has been held that a stockholder may restrain the directors from paying an unfounded claim of the secretary for extra services (Butts v. Wood, 37 N. Y. 317) and may compel the repayment of funds misappropriated by the directors (Sears v. Hotchkiss, 25 Conn. 177) * * * and may prevent corporate securities from being misapplied to the benefit of other corporations (Chicago v. Cameron, 120 Ill. 447) * * * and may prevent the conversion of the corporate assets by the officers (Atlanta R. E. Co. v. Atlanta Bank, 75 Ga. 45); and may have restrained acts which amount to a violation of

trust or a breach of the charter. (March v. Eastern R. R. Co., 40 N. H. 458; Wilcox v. Bickell, 11 Neb. 154; Manderson v. Commercial Bank, 28 Pa. St. 379); or which amount to a fraud upon the company (Ryan v. L. A. & N. W. R. R. Co., 21 Kan. 365) * * *

"In California the rule was laid down in Wright v. Oroville M. Co., 40 Cal. 20, in which case * * * Wallace, J., delivering the opinion, said:

"It is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts when done would, under the particular circumstances, amount to a breach of the very trust upon which, as we have seen, the authority itself has been conferred. (Dodge v. Woolsey, 18 How. 341).

"And the relief does not depend upon the existence of a fraudulent intent, although such intent very frequently exists."

In Pond et al. v. Vermont Val. R. Co. et al., 12 Blatchford 280, Fed. Cas. No. 11,265, which was an action brought in the United States Circuit Court, by citizens of Connecticut, as stockholders in a Vermont railroad corporation, to restrain the execution of a lease of the railroad of the corporation to another corporation, alleging that such execution was contrary to the rights and interests of a majority of the stockholders, and a fraud upon such rights, the court said (19 Fed. Cas., p. 979):

"It is not insisted and cannot be successfully claimed, that the matters complained of herein are not of equity cognizance; or that a court having general jurisdiction in equity has no

> jurisdiction, at the instance of stockholders, to restrain a corporation, or those engaged in the control and management of its affairs, from acts tending to the destruction of its franchises, or violations of the charter, and from misuse or misappropriation of the corporate powers or property, or other acts prejudicial to the stockholders, amounting to a breach of trust on the part of the managers. Dodge v. Woolsey, 18 How. [59 U. S.] 331, and numerous cases cited in the opinion in that case; and see Bacon v. Robertson, 18 How. [59 U. S.] 480, 488; Smith v. Swormstedt, 16 How. [57 U. S.] 288."

In New Albany Water Works et al. v. Louisville Banking Co., 122 Fed. 776, which was a suit in equity to enjoin an alleged breach of trust by the directors of the corporation, or other violations of corporate duty, District Judge Seaman, speaking for the Circuit Court of Appeals for the 7th Circuit, said (p. 778):

> "The right of a single stockholder to sue in equity to enjoin violations of the corporate franchise—and in the federal court when he is a citizen of another state—upheld in the leading case of Dodge v. Woolsey, 18 How. 331, is now well setablishd. 5 Rose's Notes, U. S. Reports, 587. * * * Jurisdiction, therefore, is undeniable, of a stockholder's bona fide bill to restrain an alleged breach of trust by the directors or other violation of corporate duty. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 553."

See, also,

> Vol. 4, Rose's Notes to U. S. Reports (4th ed.), pp. 1061 et seq.

4. Authorities on Receivership Sustaining Appellees' position.

Concerning the necessity of receivership in the instant suit: As heretofore stated, appellants urge that there was no showing of insolvency or inability on their part to respond to a decree. There certainly is no showing that appellants could respond to a final decree not yet entered. Appellants' brief passes by and overlooks the main point, i. e., the prevention of their continued fraudulent and wrongful acts under the domination of Wm. S. Noyes. The appellants have all been found guilty of fraud, for, as stated by Mr. Justice Gilbert, speaking for this court in Cutting v. Woodward, No. 3152, recently decided:

> "The court below found that during all this period the appellant had virtual control of the majority of the board of directors, and that they were ever ready to do his bidding. These transactions constitute actual and not constructive fraud."

In a case very similar in its facts to the instant suit a receiver was appointed.

> Meeker v. Winthrop Iron Co., 17 Fed. 52; affirmed 109 U. S. 180.

In a California case in which the bill alleged fraud and unlawful profits through breach of the fiduciary relations by certain directors a receiver was appointed.

> Aiken et al. v. Colorado River Irrigation Co. et al., 72 Fed. 591, 593.

In a suit by minority stockholders against the directors charging fraud, held, where the majority stock dominated to the detriment of minority for the benefit of majority, an injunction may be granted if it will reach the evil, but where necessary a receiver will be appointed, even if the company is solvent.

Columbia Natl. Sand Dredging Co. v. Washed Bar Sand Dredging Co., 136 Fed. 712.

Where gross fraud exists a receiver is proper; likewise referring to officers and directors of corporations.

Carson v. Allegany Window Glass Co., 189 Fed. 796.

A late California decision, Boyle v. Superior Court, 54 Cal. Dec. 718, citing subdivision 6, Sec. 564, C. C. P., holds that a receiver may be appointed in cases where receivers have heretofore been appointed by the usages of courts of equity. In this case a receiver was appointed because of a deadlock in the board of directors. This decision is a departure from the general trend of the California decisions, and aids in harmonizing our local decisions with the general authority of the various jurisdictions. See comment on this case in California Law Review, March, 1918, p. 223.

A case construing a code provision similar to the California statute is Gibbs v. Morgan, 9 Idaho 100; 72 Pacific 736, 737.

In Archer v. American Water Works Co., 24 Atl. 515, which was a case of officers and directors of

a corporation manipulating affairs of the Denver water works, the court held:

> "The bare statement of the facts makes it plain that the scheme of Mr. Venner and his party is that Mr. Venner shall control the company by depriving others of their rights. The execution of such a scheme is a fraud."

It was a scheme of Wm. S. Noyes to enrich himself and deprive others of their rights in the instant suit, which led not only to the litigation, but to his and all defendants' ultimate removal from the corporation management.

In Fougeray v. Cord, 24 Atl. 504, the corporation control was taken away from the guilty parties. The court observes in this case that it would be a reproach to the administration of justice to doubt the power and duty of the court in such a case. Said case is similar in some respects to the instant suit now on appeal.

Another case of corporate mismanagement is Hall v. Nieukirk, 12 Ida. 33; 85 Pac. 488, 489.

A further fraud case is Exchange Bank v. Bailey, 116 Pac. 814, 815.

In a Washington case of a one-man control through a deadlock in the directorate, who controlled the corporation for his own ends to the detriment of others, it was held that a receiver should be appointed, and if necessary, wind up the corporation.

Boothe v. Summit Coal Min. Co., 104 Pac. 212.

An especially well reasoned Michigan case is that of Miner v. Belle Isle Ice Co., 17 L. R. A. 419, in which it is held:

> "This corporation has utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital to be used for the sole advantage of the owner of the majority of the stock, and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitled him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations."

The Presidio Mining Company as managed had failed of its purpose. The necessary remedy was a receivership.

A very complete discussion of the subject of receivers is found in the case of Brent v. B. E. Brister Sawmill Co., Am. Ann. Cas., 1915B, p. 576; 103 Miss. 876; 60 So. 1018. In this case numerous authorities are cited by the court, and likewise there is appended thereto a very complete note on page 581 of said report. It was held:

> "A court of equity can, at the instance of minority stockholders, on a showing of maladministration by the officers supported by the majority, appoint a receiver for a going and solvent corporation, to take charge of its busi-

> ness, and, if it be shown to be necessary, to wind up its business."

In said case it was charged that the president and general manager of the company failed and refused to give proper and definite information of the company affairs; refused to have the books of the company audited; refused to give minority stockholders information; refused to listen to a minority protest against the continuation of the president in office; but in spite of all protests, re-elected the president and continued his salary at $5000 per year. It was shown in the pleadings filed that the majority control operated the corporation to their own profit and benefit. In its discussion the court, on page 578 (col. 2) says:

> "We know that in the past the courts have laid down as a general rule that a court of equity, in the absence of statutory authority, is without jurisdiction at a suit of a stockholder to wind up the affairs of a solvent going corporation, or to appoint a receiver with that end in view; and we understand that this rule has been based upon the reason that a corporation is the creature of the state and its life depends upon the action of the state, or of the stockholders as a whole. We find that in the progress of time and in the development of the jurisprudence of our land this rule has been somewhat changed, and the power of a court of equity has been enlarged for the purpose of more fully protecting the interests of all those owning interests in corporations."

Continuing, the court holds:

> "It is certainly the duty of the officers and directors of a company to conduct its affairs

so as to carry out the purposes of its organization to succeed in the business enterprise in hand, to preserve its property, and to recognize and protect the rights and claims of all parties in interest. If they fail in doing this, it is then their duty to bring the affairs of the company to a conclusion."

Quoting from the case of Miner v. Belle Isle Ice Co., p. 579:

"It is the essence of the trust that it shall be so managed as to produce for each stockholder the best possible returns for his investment."

On page 580, after referring to the hesitancy of courts to interfere in the management of corporations:

" 'It may be further said that this court has never denied power in a chancellor to prevent a scheme of irreparable injury and wrong, merely because the movers in that scheme speak and act in a corporate capacity rather than in an individual capacity.' That solvent corporations are wrecked for purely selfish and illegal purposes, that minority interests are 'frozen out', that business immorality has run amuck under the assumption that courts are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis. The board of directors of a corporation are but trustees of an estate for all its stockholders, and may not only be amenable to the law, personally, for a breach of trust, but their corporate power under color of office to effectuate a contemplated wrong may be taken from them when, by fraud, conspiracy, or covinous conduct, or extreme mismanagement, the rights of minority stockholders are put in imminent peril and

the underlying, original, corporate *entente cordiale* is unfairly destroyed. It would be a sad commentary on the law if, when the trustee of a corporate estate is making an improper disposition of it, or has shown improper partiality toward one of its conflicting parties, or has put the estate in a fix where it is liable and likely to be either wasted or destroyed, or mercilessly taken from all and given to a part, a court could not reach out its arm and preserve and administer the estate. We have never so declared the law."

In the case of Ashton v. Penfield, cited in the notes to said case (p. 583) in which a receiver was appointed, the court says:

"The conspiracy charged is proved in its scope and ultimate purpose. Fraud and extravagant and corrupt mismanagement for personal and by-ends, long persisted in and still existing, whereby the rights of shareholders have been grievously hurt, make up the miserable story of the life of this corporation. Its affairs and books have been put and kept in confusion. The truth is hid away in bad bookkeeping. Mrs. Ashton having a right to see into its affairs was arbitrarily fenced off and denied the right to look. Either an ingrained inability or lack of disposition to protect the corporation from being used as a personal convenience and perquisite of Penfield is shown. That Penfield is not a suitable person to have charge is shown. That he controls his wife and sister-in-law, thinks for them and acts for them, and that they do as he bids them do, sufficiently appears. That with knowledge of his misdoings and evil purposes they put and keep him in charge of the corporation as its only active officer and sole manager sufficiently appears. They seem to be one and all unfaithful stewards as trustees of a trust estate, hence

have forfeited the right to control that estate, however much they may masquerade under cloak of a majority of the stockholders."

Jurisdiction of courts of equity in suits affecting real property in another state or country is discussed in

Fall v. Eastin, 23 L. R. A., N. S. 924;
McGee v. Sweeney, 84 Cal. 100.

XVI.

CONCLUSION.

The appeal in this suit was initiated March 19, 1918. Many continuances were thereafter obtained by appellants. On November 1, 1918, this court was notified of appellees' objections to further continuances. The record was immediately filed, printed, and delivered to both appellants and appellees. On February 21, 1919, appellants served upon appellees their 471-page brief, printed in 11 point and 10 point type. The foregoing date was the last day permitted under the rule for said service, as both the 22nd and 23d of February were holidays.

Either the procrastination in serving the brief upon appellees was a part of a wilful plan to present a long, complicated and involved argument in the endeavor to render impossible an answer prior to the time of argument, or an inexcusable neglect to afford appellees a fair opportunity to prepare *and*

print an argument such as is required in this present lengthy appeal.

For this reason, the numerous authorities cited by appellants are not analyzed to any extent by appellees in their brief. Such an attempt within this very brief time would be a physical and mental impossibility. On the other hand, we do not deem it essential to answer the citation of numerous authorities, for the argument is built upon an impossible hypothesis, false premises, misstated and distorted facts, and it therefore reaches erroneous conclusions.

The law applicable to the facts in this suit is clear concerning agents and fiduciaries standing in a confidential relation to the principal. It is particularly applicable to the relations existing between Wm. S. Noyes and Presidio Mining Company. The agent must deal fairly with his principal. He must fully disclose all matters vitally affecting his principal's interest. He must not practice concealment. He must surrender any profits made by him through his employment, other than his lawful compensation, while in this fiduciary relationship, unless permitted by the principal to retain such profits. This rule likewise applies to directors and officers of corporations. Any gains derived by them from their acts, even though the corporation suffer no damage, at the election of any minority stockholder will be closely scrutinized, and unless fully explained, will be set aside and said officers called upon to account. The burden of proof is

on them to show their acts fair, open, unconcealed, and that no advantage has been taken of the principal.

Appellants urge that fraud must be proved and cannot be inferred. They overlook:

> "The chief exception to the general rule that fraud will not be presumed, but must be proved, arises from the existence of fiduciary or confidential relations between the parties. It is well settled that where it appears that such a relation existed between the parties at the time of the transaction alleged to be fraudulent, as, for instance, the relation of trustee and *cestui que trust,* principal and agent, * * * or that one of the parties for any reason possessed a power or influence over the other, or that one of the parties was laboring under disability such as mental weakness or intoxication, the existence of such relation or such power or influence, or such disability, raises a presumption of fraud, and the burden of proof is upon the party seeking to sustain the transaction."
>
> Vol. I, Ann. Cases, 811, and decisions cited.

It is likewise held, in Taylor v. Taylor et al., 8 How. 198:

> "The rules of law supposed to control the contracts of parties who do not stand upon a perfect equality, but who deal at a disadvantage on the one side, whether applicable to the relations of parent and child, trustee and *cestui que trust,* attorney and client, or principal and agent, have been laid down in various cases in the courts, both of England and of our own country. To trace these rules to the several cases by which they have been propounded would be an undertaking rather of curiosity, than of necessity or usefulness here, as the ex-

> tent to which this court has applied them, or is disposed to apply them in cases resembling the present, may be found within a familiar and direct range of inquiry."
>
> Citing Justice Story, Eq. Jurisprudence, Vol. I, Sec. 307.

The quotation, after referring to a relation between the parties which compels one to make a full discovery to the other, or to abstain from all selfish projects, proceeds:

> "But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance."

It is likewise urged that presumptions of uprightness and honesty are to be inferred rather than a guilty purpose; nevertheless the trial court is the arbiter, to decide what inferences shall be drawn. For, as stated in Ryder v. Bamberger, 172 Cal. 799,

> "an inference is but a reasonable deduction, and conclusion from facts proven, which court or jury is entitled to draw."

In the instant suit the trial court having inferred fraud from the proof, it is a presumption that must yield to the overwhelming evidence adduced in said court. Unless there is a gross abuse in the exercise of judicial discretion and power, the decree is not lightly to be set aside.

The trial court very carefully examined the pleadings, the evidence, the facts, and the arguments in

the case. Defendants were given a fair and impartial trial. No word of complaint has been uttered by them in this respect. They were given every opportunity to fully explain the transactions complained of. On August 29, 1916, the case was orally argued one whole day. And subsequently a 20-page typewritten brief was filed by complainants, one printed brief containing two arguments by defendants, consisting of 95 pages and 50 pages, respectively, and a closing printed brief of complainants containing 115 pages, with the appendix, were filed, and the case submitted December 2, 1916, for decision. A complete typewritten transcript of the testimony and the oral arguments was furnished to the court. After having the case under submission one year the trial court delivering its oral opinion stated (418):

> "I have taken occasion to carefully review the evidence in the case in its entirety, and likewise I have very carefully considered the oral argument, the briefs and the authorities. My conclusions, arrived at reluctantly because of the fact that they involve a finding of fraud upon the part of the defendants, have been definitely reached, however, in favor of the plaintiffs' case."

It is urged that Wm. S. Noyes is now no longer young; that he wishes his good named cleared. We have been compelled to expose the conduct of the directors and officers of this corporation, including Wm. S. Noyes, in controlling and manipulating its affairs, in order to secure equitable relief. Wm. S. Noyes has had sixty years and upwards in which

to learn that the standards of truth, integrity and honor are not to be lightly violated nor brushed aside; that others have rights which must be respected; that a man cannot serve two masters, himself and another, at the same time.

The instincts of the primal man were to take by force whatever he desired. The same primal instinct still runs through certain members of human society. For the good of all, therefore, it has been found necessary to prescribe and enforce rules of human conduct, in order that there may be safety and security of life and property. Out of our civilization has evolved the great body of our law, which must be respected, for, in the words of Hooker,

> "the very least feel her care, and the greatest are not exempt from her power."

The appellees' position always has been and now is to protect the rights of the minority which they represent, in addition to their own interests, which last named have cost appellees' family $60,000.00 of real money. Appellants have paid nothing for their stock. The minority in the Presidio Mining Company are entitled to consideration. The smallest stockholder is entitled to insist on the exercise of sincere and honest effort on the part of the officers of this corporation in its management and conduct of its affairs. When said officials are found wanting, said minority must look to a court of equity, whose

> "powers are as vast, and its processes and procedure as elastic, as all the changing emergen-

cies of increasingly complex business relations and the protection of rights can demand."

Bartlett v. Gates, 117 Fed. 71.

We respectfully submit that the interlocutory decree and order appointing receiver should both be affirmed.

Dated, San Francisco,
March 7, 1919.

WM. F. ROSE,
Solicitor for Appellees.

CHARLES CLYDE SPICER,
Of Counsel.

(APPENDIX FOLLOWS.)

Appendix.

Index.

Appendix.

ORAL OPINION (417).

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

Hon. Wm. C. Van Fleet, Judge.

In Equity—No. 196.

W. S. Overton et al.,
Plaintiffs,
vs.
Presidio Mining Company et al.,
Defendants.

Monday, December 3, 1917.

Wm. F. Rose, for Plaintiffs.
R. F. Harding, for Defendants.

The COURT (orally): This, as counsel are aware, is quite a voluminous case and has taken considerable time for consideration. I had hoped that the situation would be such as to enable me to express my views in writing, but I find the business of the Court is such that it is hopeless for a very considerable length of time for the Court to expect to find any opportunity to attend to other than the disposition of the criminal business before it; and I have concluded that it is better that the Court announce its conclusions in a general way but with

sufficient definiteness for counsel in the case to understand them; for while the case is an important one and of great interest to the parties concerned, it is not one of general public concern.

I have taken occasion to carefully review the evidence in the case in its entirely and likewise I have very carefully considered the oral argument, the briefs and the authorities. I find in going over the evidence that I took occasion during the trial, as I frequently do, to express my views quite freely and pointedly as to the impressions made by different features of the evidence upon my mind and therefore I need not go into any general repetition or recital of the evidence. My conclusions, arrived at reluctantly because of the fact that they involve a finding of fraud upon the part of the defendants, have been definitely reached, however, in favor of the plaintiffs' case. I need not, as I say, go into any general history of the controversy, but I am quite satisfied from the evidence that the original acquisition of control of this company by the defendants was through a fraudulent manipulation of the Osborne stock. The Osborne shortage, I am satisfied, came to the knowledge of the defendant William S. Noyes as early as December, 1912; that he took advantage of it to secure from Osborne that stock without any real compensation whatsoever; and that it was by the use of funds which belonged to the company but in a manner that never resulted in the shortage being made good to the company. Of course, as a book transaction it appeared to be, but

in reality it was not. I need not recite the various circumstances which culminated in the control of this corporation coming absolutely within the hands of William S. Noyes; it was by a series of transactions which to my mind led to but one result, and that is the conclusion that it was not a just and fair transaction.

The main matter for consideration in the case—the acquisition in the name of William S. Noyes of section 5—was enabled to be had by virtue of his getting control of the company and its board of directors; and I find that while the transaction was not carried out in that form, it was nevertheless an acquisition of that property by funds of this company in fact; that Noyes alone, aside from his superintendent, Gleim, was, of all the people connected with the company, fully cognizant of the character of section 5 and its value; that while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face bear the impress of having been procured by funds other than those of the company, nevertheless he knew at the time that he had potential control of this company and that he could procure the means or funds from the company with which to pay for this land; and that he pursued a course which brought that result about. The incidental transaction referred to as the bonus resolution was with that object in view; first, to secure the means by which to manipulate the control of the Osborne stock, and, second, the passing of that reso-

lution also brought about a situation which enabled him to secure the funds of the company; that and the subsequent leasing of section 5 to the corporation defendant enabled him to procure the means with which to pay every cent of the consideration paid for section 5.

Under these circumstances I am satisfied that equity, which looks to the substance and ignores the mere form in which a transaction is cast, will hold that property to be in equity the property of the Presidio Mining Company.

The entire transaction, from start to finish, after Noyes got control of the offairs of this company by getting a board of directors which was absolutely under his domination, shows to my mind a uniform and persistent manipulation of its affairs in fraud of the rights of its minority stockholders and in fact in fraud of the rights of all excepting those who were in the transaction with Mr. Noyes; and I regret very much to have to find that the real nature of these transactions was such as to show a uniform and persistent course of fraudulent manipulation of the affairs of this corporation such as really redounded solely to the interest of William S. Noyes—aside from the incidental benefit that some of his board of directors secured through increases in their salaries and the benefit which resulted to his brother in securing to him certain of the Osborne and Willis stock, and was in its entirety inequitable and in my judgment cannot be permitted to prevail; that the defendant must be called upon to account for it. And

incidentally thereto I find that he must account also for various transactions outside of that main feature of his wrong. They are not sufficiently explained to remove the *onus* from one in control of the affairs of a corporation of this kind and occupying, as I hold, a fiduciary relation to it. He has not sufficiently explained his securing of benefits through other sources. I think that he must account for all benefit which he received from the company and the manner in which he received it, particularly from his arrangement with Benton Bowers, and likewise for his transactions with Gleim & Company. The tramway transaction in particular, I think, has a peculiarly shady appearance. The arrangement by which Gleim & Company, ostensibly at least, received the consideration that they did from this company through that tramway transaction is one that I do not think, without full explanation, can meet with the approval of a court of equity; and likewise the transaction and methods by which Noyes secured payments to himself from Gleim & Company in the collection of their bills against the company and its men. All those transactions, I feel, should be thoroughly searched out, because the rule is fundamental that one occupying a trust relation, which, as I say, I think the evidence fully establishes that Noyes did to this corporation, does not admit of this sort of dealing.

I propose, moreover, because I feel that it is warranted by the law, taking the administration of this corporation out of the hands of Mr. Noyes, for that

it is absolutely in his control, although ostensibly in the hands of the board of directors, I am left with no doubt. I propose to appoint a receiver for this corporation and to try and see if the interests of these stockholders cannot be subserved by a different administration of the property, which I believe is demonstrated by the evidence to be of great value; that is, it was of great value at least at the time the control was secured by Noyes, because the income which has been dissipated in one way and another so as never to reach the stockholders has been such as to show great value in the property; and I shall direct the plaintiff to draw a decree covering the various conclusions that I have indicated and requiring the defendant Noyes and the other defendants as well to account for what I regard as ill-gotten gains and as a result of fraud.

There is another consideration which I think should be included in the accounting. I am satisfied under the evidence that the large increases of the salaries of these officers, under the circumstances which the evidence discloses, were not honest; that the siuation did not call for such increases and, having been made under circumstances where they must be explained, they must be accounted for, and unless they can be explained, the officers will have to account for the excess that has been added to their salaries by the various raises that have been shown. This so-called bonus resolution, I think, was as bald a fraud as has ever fallen under my observation. It was without any character of fundamental right

in its inception; and, of course, the finding being that the title to this section 5 should really be in this corporation, all the benefits that accrued to Mr. William S. Noyes from that transaction, as well as the subsequent lease which I hold likewise to be void, must be accounted for. I think that is all that it is necessary for me to go into. Counsel are thoroughly familiar with the case and as I suggested a recital of the details is not essential.

Mr. HARDING. Do I understand, your Honor, that the decree which your Honor directs will be an interlocutory decree?

The COURT. Oh, yes, it will have to be. The case will be referred to a master for the purpose of taking an accounting, and of course, the appointment of a receiver is separate and distinct. I hold, as I say, that the circumstances are such as to authorize the appointment of a receiver for this property, and I will receive from the parties, if they wish to submit them, the names of qualified persons; if they can agree upon somebody to act as a receiver, well and good. I have no definite knowledge of the character and capacity of person that would be called for in such a place, but I would like to see the affairs managed with such intelligence, forethought and frugality that would bring something for the stockholders, and I believe it can be done.

[Endorsed]: Filed Feby. 12, 1918. Walter B. Maling, Clerk.

SYNOPSIS OF PLEADINGS, ALLEGATIONS AND ANSWERS AS TO PRINCIPAL ELEMENTS OF FRAUD CHARGED BOTH GENERALLY AND SPECIFICALLY AS AFFECTING ACQUISITION SEC. 5. OSBORN STOCK—CONTROL OF CORPORATION; ALSO AS TO JURISDICTION AND QUESTION OF LACHES.

Fraud Generally.

Amended Complaint.	Ans. WSN.
WSN dominates maj. stock, which dominates and controls PMC. Par. XI, 45.	Deny. Par. XI, 165.
Defdt. directors conspired to defraud company and in violation of duties passed following resolutions: S. H. lease Jan. 25. WSN and LMD elected directors. $45,000 bonus. Par. XII, 47.	Deny fraud, admits resolutions. Par. XII, 167, 168.
Directors fraudulently voted bonus. Par. XIV, 59.	Deny. Par. XIV, 183.
Directors conspired fraudulently to pay WSN and deceived minority. Par. XIV, 62.	Deny. Idem, 186, 187.
Directors under control of WSN, his tools, violated duties, untrue to trust, all transactions mentioned are fraud on stockholders. Idem, 65, 66.	Deny. Idem, 190.
Salaries exorbitant, paid to defdts. for assistance in defrauding company. Idem, 66, 67.	Deny. Idem, 191.
WSN profited from various firms in Shafter for years past. Idem 68.	Admit, but disposed of about 3 years ago. Idem, 193.
Practical operation of Nov. lease fraud on stockhld. Idem 67.	Deny. Idem, 192.

Fraudulent mismanagement and misapp. of funds. Par. XV. 72.	Deny.	Idem, 198.
Compl. deceived by annual reports and letters WSN. Par. XVII, 74.	Deny.	Par. XVII, 199.
Documents removed or destroyed. Idem, 74.	Deny.	Idem, 199.
Directs. withheld inform. of contracts, concealed true conditions, defrauded corp. Par. XVIII, 76.	Deny.	Par. XVIII, 201.
Corp. defrauded out of Sec. 5 and upwards of $150,000. Par. XX, 77.	Deny.	Par. XX, 202.
Supplemental Bill.		Ans. WSN.
Acquisition of Sec. 5 a fraud on stockhlds. Par. VII, 233.	Deny.	Par. VII, 253.
Beneficiaries other than minority. Par. XI, 236.	Deny.	Idem, 258.

Acquisition Section 5.

WSN owner Sec. 5 from middle of Dec., 1912, and record owner since May 26, 1912. Amd. Comp., Par. VII, 43.	Admit, with averment that WSN was owner of Sec. 5 to May only by virtue of owning cap. stock of SHM. Ans. WSN, Amd. Com., Par. VII, 161.
WSN secured optionSHMCO in Dec., 1912. Amd. Comp. Par. XII, 46.	Admit, Ans. WSN, Amd. Comp., Par. XII, 165, 166.
Bonus resolution. Idem, 48.	Admit. Idem, 167.
Pd. WSN to Oct. 14, 1913, $24,500 and $2003.60 in royalties. Idem, 48.	Admit payment. Idem, 168.
Dec., 1912, WSN obtained option on Sec. 5 and became real owner. Amd. Comp., Par. XIV, 57.	Admit in Nov., 1912, all but 4 shares. Ans. WSN, Amd. Comp., Par. XIV, 180, 181.

Price $20,000. Idem, 57.	Deny, aver $26,000. Idem, 181.
WSN knew value Sec. 5. Idem, 58.	Deny. Idem, 181.
Directors fraudulently voted bonus. Idem, 59.	Deny. Idem, 183.
Directors knew Sec. 5 belonged to WSN. Idem, 59.	Admit. Idem, 183, 184.
WSN expenses to Texas to get stock paid by PMC $433.55. Idem, 59.	Deny. Idem, 184.
Surv. and samp. done by PMC. Idem, 60.	Admit. Idem, 184.
PMC paid WSN $24,500 on bonus in 1913. Idem, 60, 61.	Admit. Idem, 185.
PMC paid WSN $2003.60 on royalties in 1913. Idem, 61.	Admit. Idem, 185.
Funds used to purchase Sec. 5. Idem, 61.	Deny. Idem, 185, 186. (struck out, amended)
Directors conspired fraudulently to pay WSN and deceived minority. Idem, 62.	Deny. Idem, 186, 187.
Jan. lease cancelled Nov. 19, 1913. Idem, 64.	Admit. Idem, 189.
Directors authorize new lease. Idem, 65.	Admit. Idem, 190.
Practical operation of lease fraud on stockhld. Idem, 67.	Deny. Idem, 192.
PMC equitable owner of Sec. 5 and net profits. Par. XVI, Amd. Comp., 73.	Deny. WSN Ans., Amd. Comp., Par. XVI, 198, 199.
PMC in law and equity entitled to have transferred title to Sec. 5. Idem, 73.	Deny. Idem, 198.
Noyes trustee, all defdts. trustees for benefits from Sec. 5, direct or indirect. Idem, 73, 74.	Deny, aver none but WSN recd. benefits, except from profits to PMC. Idem, 199.

Supplemental Complaint.	Answer WSN Supp. Comp.
In latter part of 1912 WSN secured option on all but 4 shares SHMC. Supp. Bill. Par. II, 227.	Admit. Ans. WSN Supp Comp., 242.
Before paying for stock, went into mine with EMG and learned that 10,000 or 20,000 tons of rich ore worth over $100,000. Idem, 227.	Admit. Idem, 242.
WSN then borrowed money to pay for stock, $10,000 from bank (PMCo stock as security), $10,000 from Bowers, and note for $5000 to H. Young. Idem, 227.	Denies. Before obtaining option arranged for loan. Admits gave PMC stock to Marfa Bk. as security for $10,000 loan. Pd. H. Young $5,000 and gave his note for $5,000. Idem, 242.
Bowers sells supplies to PMC. Idem, 227.	Admit. Idem, 243.
WSN then made lease of Jan. 25, 1913, with PMC. Idem, 227, 228.	Admit, but deny that lease was made immed. on securing SHM stock. Idem, 243.
WSN prevented PMC from buying Sec. 5 through control of maj. stock and bidable board, and drawing all surplus funds. Par. VII, 233.	Deny. Par. VII, 253.
Acq. Sec. 5 fraud on stockhld. Idem, 233.	Deny. Idem, 253.
WSN recd. $63,336.60 and claims over $49,000. Par. XI, 236.	Admit. Par. XI, 258.

Control of Osborn Stock.

Allegations.	Answers.
Amended Complaint.	
LO transferred 28,607 shares PMC stock to WSN Dec. 12, 1912. Par. XII, Amd. Comp., 46.	Admit. Ans. WSN, Amd. Comp., Par. XII, 166.

Deft. directs. passed following resolutions: SH lease Jan. 29. WSN and LMD elected directors. $45,000 bonus. Par. XII, Amd. Comp., 47.	Admit. Idem, 167.
BSN elected pres. and dir. WSN and LMD elected dircts. Par. XIII, Amd. Comp., 49.	Admit. Ans. WSN, Amd. Comp., Par. XIII, 169, 170.

Supplemental Bill.

WSN took advantage of shortage of LO, and concealed same by $11,000 from treasury of company, per bonus resolu. Supp. Bill, Par. III, 228.	Deny. Ans. WSN, Supp. Comp., Par. III, 243.
Minutes Jan. 29, 1913, false. Supp. Bill, Par. IV, 228.	Deny. Ans. WSN, Supp. Comp., Par. IV, 244.
WSN owner of nearly all SHMC concealed from dircts. G&H. Supp. Bill, Par. IV, 228.	Deny, no occasion to conceal or disclose. Idem, 245.
G&H not informed of Osborn shortage. Idem, 229.	Unable to answer. Idem, 245.
Shortage known to Peat and WSN and BSN. Idem, 229.	Admit as to himself and BSN, unknown as to Peat. Idem, 245.
G & H resigned on request. Idem, 229.	Admit, inf. & belief. Idem, 245.
WSN & LMD elected directs. Idem, 229.	Admit. Idem, 246.
Feb. 15, bonus resol. Idem, 230, Par. V.	Admit. Idem, 247, Par. V.
PMC paid WSN $11,000 in two checks in Feb. Idem, 230.	Admit. Idem, 247.
WSN deposited to his own credit. Idem, 230.	Admit. Idem, 247.
Gave LO his checks. Idem, 230.	Admit. Idem, 247, 248.
LO cashed said chks. and deposited to credit PMC. No entry in books. Idem, 230.	Admit, but entry made of payment to WSN. Idem, 248.

Directors all knew and acquiesced. Idem, 230.	Admit. Idem, 248.
WSN took 1 day note of LO Feb. 21, 1913, for $10,689.75 secured by $25,000 stock. Idem, 230, 231.	Admit. Idem, 249.
Still has such stock. Idem, 231.	Admit. Idem, 249.
Dircts. consented to continuance in office of LO at $300. Idem, 231.	Admit, aver BSN made dir. & pres. to supervise financial affairs and guard company. Idem, 249.
These facts concealed from stockholders. Idem, 231.	Denies concealment for other purpose than to prevent scandal and injury to corp. Idem, 249, 250.
BSN received from LO and LMD 10,926⅝ sh. stock without paying anything. Idem, 231.	Deny. Stock consideration for services rendered and to be rendered to PMC. Idem, 250.
WSO kept in ignorance. Supp. Comp., Par. X, 235.	Deny. Ans. WSN Supp. Comp., Par. X, 256.
Withheld information of LO shortage. Idem, 235.	Admit. Idem, 256.
In Oct., 1915, officers admitted shortage. Idem, 235.	Admit. Idem, 256.

Control of P. M. Co.

Amended Complaint.	Ans. WSN.
WSN. dominates maj. stock, which dominates and controls PMC. Par. XI, 45.	Deny. Par. XI, 165.
Personnel of board of dircts., Oct. 7, 1912. Par. XII, 45, 46.	Admit. Par. XII, 165.
Jan. 29, BSN elected pres. and dir. Jan. 31, WSN and LMD elected directors, WSN vp: and gm. Par. XIII, 49.	Admit. Par. XIII, 169, 170.

Directors, under control of WSN, his tools, violated duties, untrue to trust. Par. XIV, 65,66.	Deny. Par. XIV, 190.
Salaries exorbitant, paid to defdts. for assistance in defrauding company. Idem, 66, 67.	Deny. Idem, 191.
Fraudulent mismanagement and misapp. of funds. Par. XV, 72.	Deny. Par. XV, 198.
Majority control directly liable to minority. Par. XVI, 74.	Deny. Par. XVI, 199.
Compl. deceived by annual reports and letters WSN. Par. XVII, 74.	Deny. Par. XVII, 199.
Directors withheld information of contracts, etc., concealed true conditions, defrauded corporation. Par. XVIII, 76.	Deny. Par. XVIII, 201.

Supplemental Bill.	Ans. WSN.
Minutes Jan. 29, 1913, false. Par. IV, 228.	Deny. Par. IV, 244.
WSN owner of nearly all SHM concealed from directors G & H. Par. IV, 228.	Deny, no occasion to conceal or disclose. Idem, 245.
G & H not informed of Osborn shortage. Idem, 229.	Unable to answer. Idem, 245.
Shortage known to Peat and WSN and BSN. Idem, 229.	Admit as to himself and BSN, unknown as to Peat. Idem, 245.
G & H resigned on request. Idem, 229.	Admit, infor. and belief. Idem, 245.
WSN & LMD elect. drcts. Idem, 229.	Admit. Idem 246.
WSN had secured control of Sec. 5. Idem, 229.	Admit. Idem, 247.
And also PMC. Idem, 230.	Deny. Idem, 247.

Voting Trust controlled by WSN. Par. VI, 232, 233.	Admit trust, but deny control by WSN, Par. VI, 252, 253.
Controlling stock in hands of WSN and his subordinates. Par. XI, 237.	Deny, admit control in present board of dir. and that it will probably remain in their hands. Par. XI, 259.

Jurisdiction.

Amended Complaint.	Ans. WSN.
Residence compl. Kansas and Maryland. Par. I, 40, 41.	Deny, lack of inform. Par. I, 158.
Corp. exist. Cal & Tex. Par. II, 41.	Admit. Par. II, 158.
Residence defdt. drcts. in Cal. Par. III, 41.	Admit. Par. III, 158, 159.
Compl. stockholders. Par. IV, 42.	Admit. Par. IV, 159.

Laches.

Amended Complaint.	Ans. WSN.
Directors conspired fraudulently to pay WSN and deceived minority. Par. XIV, 62.	Deny. Par. XIV, 186, 187.
Compl. not aware of acts, not consented, not guilty of laches. Par. XIV, 71.	Deny, aver laches. Par. XIV, 195, 196.
Compl. first discovered in April, 1915. Par. XVII, 74.	No knowledge. Par. XVII, 199.
Compl. deceived by annual reports and letters WSN. Par. XVII, 74.	Deny. Par. XVII, 199.
Documents removed or destr. Par. XVII, 74.	Deny. Par. XVII, 199.
Dircts. withheld inform. of contracts, concealed true conditions, defrauded corp. Par. XVIII, 76.	Deny. Par. XVIII, 201.

Supplemental Bill.	Ans. WSN.
Lack of knowledge of plaintiffs, residence out of state. Par. X, 234, 235.	No information. Par. X, 255, 256.
WSO kept in ignorance. Idem, 235.	Deny. Idem, 256.
Withheld information of LO shortage. Idem, 235.	Admit. Idem, 256.

Amended Prayer.

Vol. I page	Par.	
285	1	Injunction to prevent defts. continuing acts complained of or of carrying on business P. M. Co.
286	2	Leases, bonuses, contracts to be declared null and void.
	3	Salaries cut off; no further moneys paid on Sec. 5 account.
	4	Defts. be removed from office.
	5	That defts. be restrained from selling their stock but that it be deposited with Clerk of Court.
287	6	Defts. return their salaries to company. W. S. Noyes return excess of $200 paid Gleim.
	7	Defts. be held as trustees for benefits received.
	8	Defts. be compelled to make restitution to P. M. Co. and its minority stockholders for amounts ascertained to be due.
	9	That profits obtained by defts. other than W. S. Noyes if invested in other enterprises be declared to be in trust for P. M. Co. and accounting required.
288	10	That W. S. Noyes be restrained from transferring Sec. 5 or from collecting further moneys on Sec. 5 account.
	11	That W. S. Noyes be declared to be a trustee of Sec. 5 and profits made by him other than from his salary. Noyes has legal title to Sec. 5, P. M. Co. equitable title.
	12	That he transfer Sec. 5 to P. M. Co. on proper terms.

289 13 Profits invested by W. S. Noyes in other enterprises be accounted for.
14 Capital stock deposited with Clerk be transferred to P. M. Co. to liquidate defts. indebtedness to corporation.
15 Defts. property be subjected to lien for benefit of corp. and minority stockholders.
16 That accounting be had from defts. to corporation and minority stockholders.
17 That complainants have judgment for their costs and expenses of suit, with counsel fees. That said sums be declared a first lien on property and assets of corporation, including Sec. 5.
290 18 That receiver be appointed to take charge and if necessary wind up corporation.
19 Other relief requisite.

INTERLOCUTORY DECREE (SYNOPSIS OF)

Vol. II Page

424 All defts. other than P. M. Co. guilty of fraud upon it since Dec., 1912, in conducting its
425 affairs; participated in a conspiracy with W. S. Noyes to and did control and defraud said corporation.
424 W. S. Noyes illegally obtained benefits while in fiduciary relation;
Osborn illegally misappropriated Co. funds.
425 Leases, bonuses and contracts relative to Sec. 5, including contract Jan. 25, 1913, bonus resolution Feb. 15, 1913. Contract Nov. 19, 1913, resolution giving W. S. Noyes control over operatives, resolutions relative to salaries and increases and payments made, tramway contracts —illegal and fraudulent and void.
428 This is general finding of fraud within the issues.

DETAILS.

426 Sec. 5 illegally acquired by W. S. Noyes while in fiduciary relation; title belongs to Co. subject to payment of its purchase price; profits derived

427 therefrom by Noyes illegally and fraudulently obtained; all claims of W. S. Noyes on Sec. 5 account cancelled. Stock transactions since Dec., 1912, voting trust, bonus resolution and the Feb. 21, 1913, $10,689.75 note transaction, held part of collusive plan to illegally manipulate, control, corp. by W. S. N. through
428 his biddable Board of Directors, and are a fraud on corporation.

431 Stock transferred from Osborn put in escrow with Clerk, with promissory note; injunction kept in force.

428 Increases in salary of defendants and E. M. Gleim illegal.

428 Injunction kept in force preventing W. S. Noyes drawing moneys from Co. treasury or Sec. 5
429 account, or transferring or encumbering said property. Decrees him to transfer Sec. 5 within 30 days after final decree entered, then give full discharge of all claims against Co. on Sec. 5 account.

431 Noyes account for moneys received Sec. 5 account.

431 Noyes account for moneys received from third parties, prior to Jan. 1, 1913, back to Sept. 14, 1908—found fraudulent (p. 424). Master to
429 report nature of these transactions.

430 Salaries to be reported; Master to find reasonable or unreasonable.

432 W. S. Noyes credited with purchase price Sec. 5.

424 Osborn moneys misappropriated.

433 That he account for same. .

433 Master to report increases in salaries, directors fees, travelling expenses, production of books and records, etc. before Master.

434 Allowance of recovery for company's benefit.

434 Accounting ordered as to costs and expenses, and allowance deferred.

434 Court retains jurisdiction over parties.

KLINK BEAN SCHEDULE NO. 15.

Schedule 15.

PRESIDIO MINING COMPANY.

STATEMENTS OF ASSETS AND LIABILITIES—NOVEMBER 30, 1912, TO FEBRUARY 28, 1913.

ASSETS.	1912 November 30.	1912 December 31.	1913 January 31.	1913 February
CURRENT:				
Cash in Bank	8380.91	3303.72	258.94	6961
Bullion in Transit	10605.03	17523.66	14344.16	22521
	18985.94	14219.94	14603.10	29483
SUPPLY INVENTORIES:				
Mill Supplies	19314.71	20819.30	19054.53	18293
Mine Supplies	1079.41	710.89	1039.79	1030
Fuel Oil	2060.52	2018.21	1696.26	2719
Fuel Wood	297.51	435.04	230.01	1288
	22752.15	23983.44	22020.59	23332
MISCELLANEOUS.				
Cyanide Plant Installation		100.90	1078.34	5132
Mining Lease				45000
Section No. 5			124.30	124
Drafts	450.00	900.00	900.00	
L. Osborn	10689.75	10689.75	10689.75	
	11139.75	11690.65	12792.39	50256
Total Assets	52877.84	49894.03	49416.08	103072
LIABILITIES:				
CURRENT:				
W. S. Noyes—Balance of $45000 Resolution				34000
Mine Cash Overdraft and Unpaid Invoices	11612.44	1681.92	3581.93	14224
Total Liabilities	11612.44	1681.92	3581.93	48224
NET WORTH	41265.40	48212.11	45834.15	54848
TOTAL	52877.84	49894.03	49416.08	103072

NOTES:

Mining and Milling Property are not included in the Assets. Cyanide installation and Mining Lease only appeared on the books. Bullion in transit includes the shipment taken into account as applicable to the current months; operations; although sometimes forwarded as late as the 22d of the following month.

In figuring the available cash on February 28, 1913, the item "L. Osborn $5689.75" was considered as a cash asset in view of the fact that $5000 had already been paid and the balance $5689.75 was deposited in the Bank on March 1, 1913.

CONDENSED STATEMENT OF OPERATIONS:	Total.	December.	January.	Februa
Sales of Bullion	62757.53	22932.69	14344.16	25480
Mining Expenses	14613.95	5185.47	4845.74	4582
Hauling Ore	4461.99	1637.86	1358.90	1465
Milling Expense	24118.54	7555.41	8361.77	8201
Other Expenses	5980.38	1607.24	2155.71	2217
	49174.86	15985.98	16722.12	16466

50 CENT ROYALTY LEASE.

Minute Book, pp. 28-29 (855).

CONTRACT OF LEASE.

This Agreement made and entered into the 25th day of January, A. D. 1913, by and between The Silver Hill Mill and Mining Company, a corporation duly incorporated and organized under the laws of the State of Texas, party of the first part, and the Presidio Mining Company, a corporation duly incorporated and organized under the laws of the State of California and authorized to carry on its business in the State of Texas, party of the second part,

WITNESSETH:

that the party of the first part hereby leases to the party of the second part for the term of one year from date hereof, the following described tract of land, to wit, Survey Number Five (5) in Block Number Eight (8) said survey made for the Houston and Texas Central Railway Company, which said survey is situated in the County of Presidio, State of Texas, and hereby grants to the party of the second part for the term aforesaid, the right to enter upon, hold and possess said land for the purpose of working, mining and extracting silver bearing ores and other minerals that may be found thereon.

The party of the second part, in consideration of the premises, hereby covenants and agrees upon the execution of this contract to enter at once upon

said land for the purpose of working and extracting therefrom all silver bearing ores and other minerals that may be found therein, and covenants and agrees to pay to the party of the first part 50/100 Dollars per ton for all ores that may be taken out of said mine, the amount to be ascertained by weighing said ores and where this method shall be impracticable, then, the amount shall be determined by measurement.

It is further agreed that the said party of the second part shall monthly render to the party of the first part a true and exact account of all ores extracted from said mine and within ten days after said monthly account is rendered shall pay to the party of the first part the amount due to it for the month for which said account is rendered.

It is further agreed that this lease shall terminate on thirty days notice given in writing from either party to the other party to this contract.

In testimony whereof, the party of the first part has caused these presents to be signed by its President and countersigned by its Secretary, with its corporate seal to be hereunto affixed, pursuant to an order of its Board of Directors, and the party of the second part has caused these presents to be signed by its President and countersigned by its Secretary with its corporate seal to be hereunto affixed.

Seal
Silver Hill Mill and Mining Company. W. H. Cleveland, President.
T. R. Russell, Secretary.
Seal
Presidio Mining Company John W. F. Peat, President.
L. Osborn, Secretary.

$45,000 BONUS RESOLUTION * (860).

Minute Book, pp. 32-33.

Whereas, at the request of this corporation, Wm. S. Noyes has expended large sums of money and has rendered valuable services to this corporation outside the line of his employment in negotiating and securing for this corporation that certain lease from the Silver Hill Mill and Mining Company to this corporation dated January 25th, 1913, and set forth in these minutes on pages 28, 29 & 30, and will render further valuable services to this corporation by securing to this corporation a continuation of said lease, thereby securing large profits to this corporation, be it therefore Resolved that this corporation do pay said Wm. S. Noyes, as compensation for said services heretofore rendered and hereafter to be rendered, the sum of forty-five thousand dollars ($45,000.) in manner following, to wit: Eleven thousand dollars ($11,000.) forthwith, the further sum of ten thousand dollars ($10,000.) ninety days from this date the further sum of twelve thousand dollars ($12,000.) five months from date, and the further sum of twelve thousand dollars ($12,000.) six months from date, Provided that if the earnings of this corporation shall not be sufficient to make said deferred payments at the respective times above provided, then said deferred payments shall be made to said Noyes as fast as the earnings of this company will permit. The President and Secretary are hereby authorized

* See November 19, 1913, contract page....Appendix where appellants call this a $45,000 "Bonus" to Wm. S. Noyes.

and directed to make the payments herein provided and to take receipts therefor as made.

NOVEMBER 19, 1913, LEASE (873).

Minute Book, pp. 40-43.

Whereas, this corporation made and entered into a contract of lease with the Silver Hill Mill and Mining Company bearing date the 25th day of January, 1913, and set forth in these minutes on pages 28-30, and Whereas, by resolution adopted on the 15th day of February, 1913, and set forth in these minutes pages 32-33, this Board resolved to pay W. S. Noyes the sum of Forty-five Thousand (45,000.) Dollars in the manner therein specified, as a bonus or compensation for procuring said lease; and Whereas it was the intention of this Board that by the arrangements above recited this corporation should make a large profit from the ores to be taken by it from the mine of said Silver Hill Mill and Mining Company, and that from such profit, and not from its other resources, this corporation should pay said bonus or compensation to said Noyes; and Whereas said Noyes offered to this corporation the opportunity to purchase said Silver Hill Mine at the cost thereof but this Company was unable to purchase the same and declined to do so because of its financial inability, and in order to secure to this Company the opportunity to make a profit from said mine the said Noyes

thereafter purchased the entire capital stock of said Silver Hill Mill and Mining Company and has caused said corporation to be dissolved and the said mine to be conveyed to him, but said Noyes declines to continue said lease for the reason that the profit made by this Company out of ores taken from said mine up to this date has been unduly large and unfair to said Noyes and he now offers to enter into the lease set forth below.

Be it therefore Resolved, That the President and Secretary of this Corporation be and they are hereby authorized and directed on behalf of and as the act and deed of this corporation, to enter into and execute a contract with said W. S. Noyes in the words and figures following, viz:

"THIS AGREEMENT, made and entered into the 19th day of November, 1913, by and between William S. Noyes, the party of the first part, and the Presidio Mining Company, a corporation duly incorporated and organized under the laws of the State of California, and authorized to carry on this business in the State of Texas, the party of the second part:

Witnesseth: That the party of the first part hereby leases to the party of the second part for the term of one year from date hereof the following described tract of land, to wit: Survey Number Five (5) in Block Number Eight (8), said Survey made for the Houston and Texas Central Railway Company, which said Survey is situated in the County of Presidio, State of Texas, and hereby

grants to the party of the second part for the term aforesaid the right to enter upon, hold and possess said land for the purpose of working, mining and extracting silver bearing ores and other minerals that may be found thereon.

The party of the second part, in consideration of the premises, hereby covenants and agrees upon the execution of this contract to enter at once upon said land for the purpose of working and extracting therefrom all silver bearing ores and other minerals that may be found therein and covenants and agrees to pay to the party of the first part one-half the net value of any and all ores that have been or may be taken from said mine by said party of the second part and reduced in its mill; said net value to be determined as follows, to wit:

A record shall be kept of the number of tons of ore taken by party of the second part from said mine and the average assays thereof in the stopes from which it is taken; a similar record shall be kept of the ores taken by said party of the second part during the same period from its own mine and from the two records so obtained and kept the average stope assays of all the ore milled from both said mines for a given period shall be deduced. After said ore shall have been milled, the average extraction in fine ounces of silver shall be ascertained and the percentage of the average stope assays actually extracted shall be calculated and determined and the gross value of its ore taken during such period from said Silver Hill Mine shall

be deemed to be the average stope assay multiplied by said percentage of extraction. From such gross value, the actual cost of mining and milling, less the sum of $1.00 per ton for the smaller cost of mining in said Silver Hill Mine as compared with the mine of party of the second part, shall be deducted and the difference shall constitute the net value of the ores so taken during that period by party of the second part from said Silver Hill Mine. Freight, expressage, insurance and refinery charges upon the bullion obtained from all such ores shall be treated as a part of the cost of reduction.

And in view of the large profit already made by said party of the second part from ores heretofore taken from said Silver Hill Mine, it is agreed that such sums as have been paid to the party of the first part under and by virtue of that certain resolution of the Board of Directors of party of the second part on the 15th day of February, 1913, and all royalties heretofore paid on account of said lease from said Silver Hill Mill and Mining Company shall be retained by the parties to whom they have been paid and shall be treated as a payment to party of the first part on account of the proportion of net profit from said mine hereby agreed to be paid by party of the second part, it being the true intent hereof that an equal division of the net profit herein specified will constitute a fair and just price to be paid to said party of the first part for the ore so bought from him, said party of the first part furnishing the ore and the party of the

second part reducing the same without the investment of any capital.

It is further agreed that the party of the second part shall monthly render to the party of the first part a true and exact account of all ores extracted from said mine during the preceding calendar month and a statement of the profit derived therefrom, and within ten days after said account is rendered shall pay to the party of the first part the amount due to him under the provision hereof for the month for which said account is rendered.

It is further agreed that this lease shall terminate on thirty days' notice given in writing from either party to the other party to this contract.

It is further agreed that all ores that have been taken out of said mine by party of the second part shall be deemed to have been taken out under the provisions of this contract and shall be settled for by said party of the second part as herein provided, and that the contract of lease by and between the Silver Hill Mill and Mining Company and this corporation bearing date the 25th day of January, 1913, shall be, and the same is hereby, cancelled, annulled, abrogated and set aside.

It is further agreed that the provisions of this contract shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto.

In testimony whereof, the party of the first part has hereunto signed his name, and the party of the

second part has caused these presents to be signed by its President and countersigned by its Secretary, with its corporate seal to be hereunto affixed.

WM. S. NOYES
PRESIDIO MINING COMPANY
(Seal) By B. S. Noyes, President.
By L. Osborn, Secretary.

BY-LAWS OF PRESIDIO MINING COMPANY.

ARTICLE IV.

Power of Directors.

The directors shall have power:

1st. To call special meetings of the Stockholders when they deem it necessary. And they shall call a meeting at any time, upon the written request of Stockholders holding one-third of all the capital stock.

2d. To appoint and remove, at pleasure, all officers, agents and employes of the Corporation, prescribe their duties, fix their compensation, and require from them security for faithful service.

3d. To conduct, manage and control the affairs and business of the Corporation, and to make rules and regulations, not inconsistent with the laws of the State of California or the By-Laws of the Corporation, for the guidance of the officers and management of the affairs of the Corporation.

4th. To incur indebtedness. The terms and amount of such indebtedness shall be entered on the minutes of the Board, and the note or obligation given for the same, signed officially by the President and Secretary, shall be binding on the Corporation.

MEETINGS OF BOARD OF DIRECTORS SINCE JANUARY 1, 1913, TO SEPTEMBER 23, 1915, SUMMARIZED FROM MINUTE BOOK (Tr. 854-890).

1913		Tr. page
Jan. 29.	50-cent royalty lease voted; to borrow $15,000; election of B. S. Noyes to the Board and as President; Peat appointed Asst. Secy.; authority to President and Secretary to sign notes, etc.	854
Jan. 31.	W. S. Noyes and L. M. Doherty elected Directors; W. S. Noyes appointed Vice-Pres. and Gen. Mgr. with no change in salary.	859
Feb. 15.	Bonus resolution; W. S. Noyes authorized to employ and remove superintendent and all other employes.	860
April 2.	President's salary raised from $25 to $150.	862
June 7.	Company to borrow money from Wells Fargo Nevada Natl. Bank.	863

DEFENDANTS' EXHIBIT C (642).

Feb. 26, 1916.

Captain W. S. Overton,
995 Pine St.,
San Francisco, Cal.

Sir:

I beg to acknowledge the receipt of your letter of Feb. 24th which reached me yesterday afternoon.

I agree with you entirely that it is your right as a stockholder to know the matters about which you inquire; but inasmuch as you have every particle of the information that is necessary to fully answer those inquiries, I do not understand how or why you need to ask the questions of anyone. Nevertheless, I will endeavor, to the best of my ability, to answer your questions fully and make the subject as clear to your comprehension as I can.

1. The profit from Section 5 is shown on the table attached to each voucher for Ore Purchases and the profit for any given period, say one year, is the aggregate for that period of the amounts thus shown.

2. The same vouchers for Ore Purchases show the amount credited to W. S. Noyes for ore purchases, as does also the ledger account so entitled. and a deduction of the aggregate amount so credited from the aggregate referred to in the preceding paragraph leaves the net operating profit to Presidio Mining Co. from Section 5 for that period.

3. The annual report shows clearly for any given year the gross income from all bullion, the total

operating expenses and the consequent operating profit. For periods of less than one year, those matters appear, of course, on the Company's books and vouchers.

4. A comparison of the net operating profit of the Presidio Mining Company from Section 5 (which is one-half of the net) with the Company's operating profit from both mines for the same period shows by the difference the profit or loss from Section 8.

Applying the foregoing to the year 1915, you would get the following results:

Total profit from Section 5 (aggregate of statements accompanying vouchers for ore purchases)	$71,686.40
Credit of Ore Purchases (obtainable from vouchers or from ledger account)	35,843.20
Operating profit to P. M. Company from Section 5 (½ net)	$35,843.20
Presidio Mining Company's operating profit from both sources (shown by annual report or obtainable from books before receipt of report)	$20,209.30
Operating loss on Section 8, obtained by difference	$15,633.90

Applying the same process to the fiscal year 1914 (covering the period from Sept. 1, 1913, to Dec. 31, 1914) you would obtain the following results:

Total operating profit obtained from Section 5 ascertained in the manner above indicated	$123,356.40

Less ore purchases as ascertained above	61,678.20
P. M. Company's operating profit from Section 5	$61,678.20
Operating profit of P. M. Co. from both sources (shown by annual report)	$46,055.06
Operating loss on Section 8, obtained by difference,	$15,623.14

And for the fiscal year 1913, the same process leads to the following results:

Operating profit from Section 5	$30,736.40
Less ore purchases	15,368.20
Making an operating profit of P. M. Co. from Section 5	$15,368.20
Net operating loss of P. M. Co. on both operations	3,543.71
Operating loss on Section 8, obtained by addition	$18,911.91

It is interesting to note that the decline in the price of silver more than accounts for the operating losses on Section 8 and the fact that had the price of silver remained stationary it, by these operations, would have produced a profit from both properties.

Trusting that I have made the subject perfectly clear, I am

Yours truly,

President.

COMPLAINANTS' EXHIBIT 20 (778).

(All letters in possession of any of us file in office Feby. 23.)*

995 Pine Street,
San Francisco, Cal.
February 15, 1916.

President, Presidio Mining Co.,
San Francisco, Cal.

Sir:—

This morning I was informed by the Secretary, Mr. Peat, on my request to have all correspondence of the company put in the company office, that the only letters from Mr. W. S. Noyes to Mrs. Willis are in evidence, that there are no letters between Mr. W. S. Noyes and Mr. E. M. Gleim, and that as Mr. Harding has all letters not on file from stockholders these can be had later.

There is one letter from Mr. W. S. Noyes to Mrs. Willis dated January 25, 1914, from which extracts were read in court, but the letter itself was not put in evidence (page 547, transcript). This letter states the operating profit for the previous four months, and also refers to certain payments made at that time.

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I request that this letter be placed in the company

swer

office, and also that the answers of Mrs. Willis to it and to any other letters referring to company business be also placed there.

In regard to the correspondence between Mr. W. S. Noyes and Mr. E. M. Gleim, there were copies of several letters in the office at Shafter in August, 1915, from which Captain Overton took extracts.

*This and the marginal notes in pencilled handwriting W. S. Noyes.

I quote a few below, and request that these letters, either retained copies or originals, be placed on file in the company office, as well as the other letters to which reference is made in these quotations, and those to which these are answers.

EXTRACTS, W. S. NOYES TO E. M. GLEIM.

April 10, 1913.

I am a little uneasy about where we will come out in the matter of available surplus because as yet we have no advice of any bullion shipment later than Bar 6054. too old not kept

April 21, 1913.

I will have Mr. Osborn send you $3000 more within a couple of days, or as soon as he gets more money from Selby's. I suppose much of the high disbursements so far are for construction. "

June 6, 1913.

The company has today arranged to obtain a loan of $10,000 from the Wells Fargo Nevada National Bank, and consequently we will be well able to take care of our accounts as they come up; but nevertheless I wish you would telegraph me on receipt of this letter the amount of free cash you have applicable to June accounts, or after the close of May business, unless you receive a telegram that I am on the way south. "

Sept. 4, 1913.

I would like very much if you will see Harry Young and ask him to try to find and send me the tax bill on Sec. 5 for 1912; the Silver Hill Company's books show it to have been paid, but the receipted tax bill is not with the vouchers.

November 3, 1913.

Your letter of Oct. 29th is just at hand.

* * * * * *

On Oct. 9th and on another occasion some time before that I wrote you that I would like an opinion from you as to the extent of the No. 13 ore body. You know Clark estimated that at about 10,000 tons; it seemed to us that there was much more.

March 11, 1914.

Enclosed please find the new contract with Gregg & Gleim with one copy properly executed upon the part of the company. Fill into both copies the date of the original contract in the space left blank for the same, and after obtaining the signature of Gregg & Gleim return the uncovered copy to L. Osborn, Secretary.

April 2, 1914.

I have not seen Arthur Painter since I have been back here nor heard of him except when ordering repairs you have made a requisition for. I am of the opinion that he is studiously keeping away from me, for he cannot but be aware of the comparative fizzle they have made in building the tramway, in respect of the cost of installation.

April 22, 1914.

In vouchering the $750 monthly payment to Gregg & Gleim account of the tramway, I would word it just about as expressed in the contract, i. e. one twelfth of the commuted profits on hauling ore and charge it to ore transportation. no copy here

EXTRACTS, E. M. GLEIM TO W. S. NOYES,

Sept. 21, 1913.

Replying to your letter of the 17th the Ledger Account "Cyanide Installation" has been closed. not kept too old

* * * * * *

My estimation of tonnage available in the Presidio Mine of, or above, a cyaniding grade is 300,000 tons.

My estimation of tonnage available in Sec. 5 of, or above, a cyaniding grade is 100,000 tons.

Oct. 2, 1913.

E. G. has taken up the matter of the $4000 note with Sullivan and considers that it is settled. I will explain to the proper persons the reason for the delay in the matter to which you referred. not kept too old

Dec. 28, 1913.

I suggest that we pay Gregg & Gleim for the ore hauling which they are now doing by allowing the old rate to obtain after the tram starts until such time as we are paid up. not kept

March 3, 1914.

Several amendments, any one of which was satisfactory to us, to the contract between Gregg and Gleim and the Company for the building and operation of the rope tramway; were proposed and submitted to us by Gregg & Gleim, with the idea of placing the entire control of the tramway in the Company's hands and thereby avoiding any conflict of authority in its operation or any division of liability in case of accident or for any other cause.

Aug. 10, 1914.

I wish I might get you to cut the expense of the s.s. for the next few months at least. It seems to me much in excess of anything that is necessary.

Jan. 30, 1915.

I went to Marfa yesterday to see about the note held by the Marfa National Bank. Mr. Fennell had just written you a letter which I enclose herewith.

March 29, 1915.

I will show Capt. Overton everything there is to see and answer any questions that he may ask. From what you say I take it that he has a bunch of the Mills stock and that you are pleased that he has.

April 26, 1915.

Referring to your letters from Mar. 26 to date:—
Capt. Overton's Visit. * * *

Again requesting that all of the letters above referred to be placed on file in the company office as soon as possible.

Very truly yours,

CONSTANCE MILLS OVERTON.

DEFENDANTS' EXHIBIT B (Tr. 623).

The Montclair,
995 Pine Street,
San Francisco, Cal.
July 29, 1915.

Dear Mr. Gleim:

Well, you see I have struck and struck *hard.* I shall pursue these men to the end of the trail and shall live here the rest of my life if necessary.

I have telegraphed Mr. Stevens to ask the El Paso papers to say that I hold you in highest esteem—you are the only clean official in my opinion.

In going over the books I learn we pay some one $46 a month regularly from the S. F. office to spy on you. I asked Osborn who the spy was but he said "I don't know. Only Mr. Noyes knows who he is." So be *discreet.*

You will never have them over you again. I expect I shall have quite a little to do with it hereafter and with honest men in the mine will be a success. Bonuses will go in dividends.

I have told the S. F. reporters that I have only one thing to say beyond what they see in the complaint and that is Mr. E. M. Gleim is an honorable

and efficient official and is excluded in my complaint of the management.

I think better days are in store for you. Mrs. Overton liked you and your wife too. I have not written because I did not want these people here to jump on you as assisting me—which you did not.

I am glad I like you. I so hate those "bonus" men up here it is a relief to recall a clean efficient official. Of course, Noyes would insist on this too for he needed *all* the graft.

If I ever control the management here I pledge you my word I shall put no spy on you; I wouldn't insult a man so.

Please regard this note only as confidential. You can show the rest all you please. It is in the press now.

Anything you may say to me will be considered confidential but with your spy there it is best not to write me.

Hastily,

(Signed) W. S. OVERTON.

DEFENDANTS' EXHIBIT A (Tr. 621).

Shafter, Texas,
August 10, 1915.

Mr. E. M. Gleim,
Shafter, Texas.

Dear Sir:

1: You received a personal letter from me dated July 29, 1915, and marked by me "confidential."

2: Mr. W. S. Noyes, whom I am accusing of very serious charges in the courts telegraphed you in secret code as follows:

"You will probably receive letter from plaintiff. Send by mail with envelope."

3: Mr. Noyes exceeded his rights in ordering you to send him a private letter. I am not an official of the corporation and Mr. Noyes presumed a great deal in issuing such an order, he did not even have the decency to put such a message in English but had to resort to a secret code. My present object in life is to turn the light and truth on Mr. Noyes' machinations; I do not expect to have to resort to his secret weapons.

4: On questioning by me you admit that you expect Mr. Noyes to call upon you for a report of my words, acts, etc. I must inform you that Mr. Noyes is a Director of the Presidio Mining Co. and that I have the legal right to have access to all communications from him to you on all matters (secret or otherwise) relating to the mine, the corporation or my suit against the directors. These are official messages and I demand as a stockholder that none of them be concealed or destroyed even if Mr. Noyes so orders. Any personal communication not bearing on the corporation, etc., is a different matter; but if the communication even touches on these matters they must be kept where I shall see them.

5: I have requested you to give me a copy of my "confidential" letter to you; also of the translation of the telegram referred to above.

6: When Mr. Noyes calls on you for what I did, etc., it may help you to send him a copy of this letter. I took many extracts from letters and records; I interrogated you closely on mine affairs; I discussed my complaint to you fully; I reminded you that I had arrived here unsuspicious of Mr. Noyes after my interview with him March 24, 1915, and that I had questioned you as to the method of keeping the record of Sec. 5 and that I told you then that I had been told that a record of cost was kept here at the mine by Mr. Noyes; I told you that Mr. Noyes had lied to me and my wife; and that I had a move in reserve that would stagger Mr. Noyes.

You answered my questions (all of which were proper) frankly and honestly; you told me you could not take sides and that as a soldier I could understand your attitude; you have made no reflection on anyone connected with the suit; you have dealt with facts as such without comment. If these facts were damaging to Mr. Noyes that is a conclusion I alone have made.

Very truly,

W. S. OVERTON,

Captain, U. S. Army (Retired).

DEFENDANTS' EXHIBIT IV (Wm. S. Noyes' Answer of August 13, 1915, to original Bill of Complaint).

Eastern Point, Gloucester, Mass.,

Oct. 1, 1913.

Dear Mr. Osborne:

Yesterday Mr. Lyons of Halsey & Co., read General Mills a letter from Mr. Noyes of the cyanide

plant you had installed and Mr. Noyes said you expected to net $50,000 a year now. This seems too good to be true and especially to me now as I am very hard up due to two children of my own and a widowed sister with two babies for me to take care of. This news has cheered me up wonderfully. I hope you can confirm these hopeful expectations. I cannot wait for the Annual Report.

Was the plant put in from earnings? If so *"Hurrah"!*

Please write me all about it. Miss Kline to whom General Mills gave some of his stock is in the house and almost as excited as I am over the good news.

Very truly,

W. S. Overton.

Gen. Mills is hale and hearty and so is Mrs. Mills.

Please address No. 2 Dupont Circle, Washington, D. C.

DEFENDANTS' EXHIBIT I (Tr. 668).

General Anson Mills, U. S. Army (retired)
No. 2, Dupont Circle, Washington, D. C.

April 26, 1907.

Mr. John F. Boyd,
President, Presidio Mining Company,
216 Powell Street, San Francisco, Cal.

My dear Mr. Boyd:

Yours of March 1st, with enclosure, was duly received, and I beg your pardon for the gross neglect I have given you, especially as you have always been so kind and upright with me in our

dealings with the Presidio business. I have now your second letter of the 18th instant. I had no adequate excuse for my neglect, but will explain that when your first letter was received the slump in the stocks of railways and industrials was in progress and as Mrs. Orndorf, who lives with me, and I have a great deal invested in that line we did not feel like taking any action until we saw how that matter was coming out, which is still in agitation. Then comes the great political excitement, which will probably keep the financial matters in a turmoil for the next year; then comes the silver slump, so we did not feel like joining you in the cyanide proposition and do not yet.

Of course you know more about such matters than I do, but it seems that it would be rather risky to put $70,000 in the business as it stands now. I suggest that it would be better to shut down for at least a year; discharging all employes save two or three inexpensive men to watch the property; sell off all the transportation property and other property that is expensive to maintain and await for future developments. If the country settles down to the business basis of a year ago and silver rises to, say 60 cents, I think we might start the cyanide process up at the mine, as you suggest in your last letter, saving the expensive transportation.

Thanking you for your kindness and regretting that I had neglected you so long, I am,

Yours very truly.

Anson Mills.

COMPLAINANTS' EXHIBIT 27 (Tr. 1071).

Presidio Mining Co.,

San Francisco, January 30, 1913.

Mr. Wm. S. Noyes, Supt.,

Shafter, Texas.

Dear Sir:

This is to advise you that we have today written to the San Antonio National Bank that we intended to close our account with them. The reason we assigned was that it was far more convenient for us to do business through Marfa and we took occasion to thank the San Antonio National Bank for their attention to our business in the past.

I also take occasion to advise you that at a meeting held on January 29th the directors of the company passed a resolution authorizing you, as superintendent, to borrow money upon the credit of the company up to the sum of $15,000 and at the most advantageous rate of interest you could obtain, not exceeding 8%, for the purpose of remodeling the company's plant, which resolution appears upon the company's minutes.

Yours very truly,

(Sgd.) B. S. Noyes,

President.

No. 3253

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this Complaint,
Appellees.

REPLY BRIEF FOR APPELLANTS.

R. T. HARDING,
HENRY E. MONROE,
Solicitors for Appellants.

J. J. DUNNE,
Of Counsel.

PERNAU-WALSH PRINTING CO.

Index to the Principal Matters Discussed in This Reply Brief.

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Appellees.

REPLY BRIEF FOR APPELLANTS.

GENERAL FEATURES OF APPELLEE'S BRIEF.

No definitely reasoned theory of this cause can be extracted from the unsystematic, partisan and misleading brief filed herein on behalf of the appellee.

In our opening brief, we made an effort to be of some assistance to the court by endeavoring, in good faith, to reason out our objections to what we regard as prejudicial action by the learned judge below, and to enforce our reasoning by the citation of authorities which we deemed to be in point; we assumed, and still assume,

that this court will determine for itself, from the transcript of record, the character of this cause, irrespective of the assertions of counsel upon either side, however dogmatic; we believed, and we still believe, that this court, having determined independently the nature of this cause, will look into the briefs to ascertain what reasons are urged for the reversal of this decree, and what authorities are presented in support of such reasons; and it was in the sincere desire to be of some practical assistance to the court that we adopted the plan pursued in our opening brief. But, when considered from the standpoint of a real aid to the court, whether in the presentation of original reasoning, or of the results of research, the appellee's brief impresses us as being singularly deficient; it seeks to meet a conscientious attempt to discuss the vital issues in the cause by unsupported assertion; its attempted reproductions of the facts are garbled; it wastes useful space by multiplying citations upon inapplicable propositions; and instead of attempting to argue out, in a spirit of close adhesion to the actual disclosures of the record, the vital issues in the cause, it seeks to meet the contentions of the appellants by empty declamation, unsupported either by reason or by authority.

As we read the appellee's brief, we cannot resist the impression that he presents his case as if his mind were surcharged with a distinctly personal grievance; and since there is nothing in the nature of the questions presented here for investigation which can legitimately call for the very extreme and exaggerated declamations found in this brief, these appellants have the

right, we think, to ask what manner of cause it is which requires such sinister assistance, and to ask the court to measure the appellee's case, among other considerations, by the consideration that no case, strong enough to stand alone, needs to be eked out by inflammatory language; and to suggest that no additional presumption arises in favor of the cause of any litigant who resorts to exaggerated superlatives. One would suppose that it would be realized that dogmatic assertion is always feeble, and that a printed argument should go beyond mere declamatory asseveration and point out the connections and inter-relations of the facts, exhibiting their probative value and the inferences legitimately to be drawn from them. In the businesslike briefs of modern times it is evidence plus temperate speech rather than impassioned declamation which prevails; and vehemence, especially in arguments addressed to cool-brained judges, has grown to be quite out of place. The "sound and fury" order of argument is now rarely heard or attempted, and is accurately assessed; and the modern advocate deals in facts rather than in fancies, and in figures of arithmetic rather than in figures of speech.

A statement is not any stronger because an advocate vehemently protests that it is true, nor is an argument made more favorable by mere declarations that it is conclusive. Assertion is not proof, nor is affirmation argument; he who advances an argument and straightway proclaims its conclusiveness, invites suspicion, and, like the player Queen in Hamlet, he "doth protest too much"; and his overmuch protestation recalls the individual who ran about the streets crying, "Lo! I am

an honest man''. Unsupported assertions, however positively made, are but empty things, carrying neither weight nor conviction; and it is folly to imagine that a contention can be strengthened by vociferous overstatement. Exaggeration in any form is an indication of weakness; but no form of exaggeration is more vicious than that in which propositions, whether of law or of fact, are hurled at a judge as if he were being challenged or defied to dispute them. We do not require that Mr. Justice Story should tell us that:

> ''Loose declamation may deceive a crowd
> ''And seem more striking as it grows more loud.''

We know, indeed, that the advocate whose statements are extreme and declamatory is forever crucifying trifles; his conceptions of his case are always disproportioned; when such a man praises, it is like the praise of a circus poster; when he blames it is like the blow of a battle axe; neither restraint nor conservatism is for him; he argues his case with a curl of the lip, with a tongue that is of studied purpose sword-like, and with a mind of iconoclastic discernment; he is a victim of professional dyspepsia.

According to the mental attitude revealed in this brief, no man who has understanding sufficient to carry him through the first proposition of Euclid can read this masterpiece of demonstration and honestly declare that he remains unconvinced; but we have formed a very different opinion; we think that our opponent's theory rests altogether upon misapprehended facts and false principles; and that even upon those misapprehended facts and false principles he does not reason logically.

One finds, indeed, certain sheets of paper covered with words taken from the English Dictionary, but beyond that, nothing. The great mass of the brief is quite without definite meaning, and an energetic intellectual effort to grapple with it at once discloses its inconclusiveness, inaccuracy and emptiness. It seems impossible to extract from this brief distinct propositions supported by specific facts; and a survey of the brief as a whole convinces us that, without adducing a solitary real fact with any approach to accuracy, and without even taking the trouble to perplex the issues by a single plausible sophism, this appellee would placidly dogmatize away the interests of the one man who saved from ruin an enterprise that those who now criticize him, and those they obtained their stock from without the payment of a penny and as part of a scheme to avoid corporate liability, would not stir a finger to save. The author of this brief seems to be carried away by the desire to "control the management". He seems to profess the belief that a farmer upon shares would be an ideal manager of a mine of the characteristics and environment of this; while he enjoys a particularly copious and fluent imagination, yet he seems wholly bereft of that clarity of vision which would have enabled him to distinguish in this record between what he might sanely believe, and what he would like to believe. Great works in fiction are the arduous victories of great minds over great imaginations; but here we are confronted with the commonplace victory of a profuse imagination over an imperfectly attentive mentality.

At various places in this brief, the author has indulged in a style of statement which we understand to be

entirely unauthorized and improper; the effort is made to bolster up the case of the appellee by the expression of personal opinions, by declaring what the author's own thought and own belief are as to this case; and the author is very emphatic in his assertions and very loud in his pledges. But, as we understand the rule of professional ethics, it is not proper for counsel to endeavor to assist his client's cause by a personal pledge of his belief in the honesty of the plaintiff or in the dishonesty of the defendants; that, we submit, is no part of a lawyer's duty. Is this case, we ask, to be tried upon the mere assertions of counsel, counsel for the appellee asseverating with all the power of dogmatism his view and his belief, and counsel for appellants meeting that by equally positive statements of their individual opinion and their belief? Counsel are here, we think, to collate the testimony, to present the law, to discuss the case, but not to express their individual opinion or their personal belief; and we consider that we properly fulfill our duty by discussing the law and the evidence, without any expression of our individual opinions or beliefs, and by asking this court to deduce from that law and evidence a fair and just conclusion. That, we understand to be our province and our duty, and the boundary of the province and duty of every advocate that appears in a court of justice; but since the brief for the appellee, in more than one place, has sinned in this regard, we are therefore constrained to remind the court that this cause is to be determined, not upon the statements of counsel, but upon the evidence in the record.

A general survey of this brief discloses unwarranted assumptions, extravagant epithets, false promises, fallacious reasons, new ways to pay old legal debts, misapprehension of *Cowell v. McMillin,* separation of witnesses into two classes, with all the angels upon the side of the appellee, and all the demons on the side of the appellants, crass ambiguities in the use of legal terminology, wilful misleading, the mobilization of straw men, and plain misstatements of the testimony; and out of this complex the only statement which we have been able to discover which even indirectly would give the appellants credit for anything is the declaration upon the first page wherein it is stated that our general statement of the litigation is controverted because, if you please, of its argumentative and prolix character, but not, be it observed, because of any inaccuracy or of any attempt at misleading.

We have said that this brief includes unwarranted assumptions; and an illustration of that may be found, for example, upon page 49, where the assumption is made that Mr. Noyes "took wrongful advantage of his confidential relation with the company", and that "in practical effect the company funds were used to pay for the property". We think it would be very much more to the point if, instead of making unwarranted assumptions, of which these are but random samples, this appellee had devoted his energies to the establishment of a confidential agency between Mr. Noyes and the Presidio Mining Company as to Section 5, the tract of land in dispute; and that it would very much enhance the utility of his brief if some faint attempt at

least had been made to trace company funds into the purchase price of Section 5. We venture the statement that nowhere throughout this record can be found any evidence, oral or documentary, constituting an authority or direction from the Presidio Mining Company to William S. Noyes to act as its agent in respect to Section 5, nor can any evidence be found, either oral or documentary, which successfully traces into the purchase of Section 5 any of the funds of the company.

We have said that this brief indulges in extravagent epithets; and an illustration of this can be found on page 111, where we encounter such exaggerated declamations as "a most shocking case of fraud", "such glaring fraud", and "gigantic fraud"; and also for another example, upon page 118, where Osborn is referred to as a "thief", Peat as a "dummy", and B. S. Noyes as the confessed errand boy of William S. Noyes, and chief assistant in concealing the Osborn shortages, and Miss Doherty as an echo and a pliant tool. As we have already pointed out, inflamatory language of this character raises no additional presumption in favor of this appellee; to shriek fraud is not to establish fraud—the question is not one of lung power; and this futile and vociferous tirade, displaying more egoistic passion than altruistic wisdom, is quite upon a par with the bewildering confusion manifested generally throughout this brief. We submit that no one may justly call Mr. Noyes or the others evil names unless he is prepared to make those names harmonize with the wonderful success of Noyes and the others in accomplishing the rehabilitation of this company; and the grosser the

names that these people are called, the more difficult becomes this appellee's real task of solving the problem of explaining how it was that these people accomplished so much, and how it was that their work lasted so long. We submit that it is not open to any appellee to fling charges, and then to leave unexplained the problems they create. Of course, if the object of this appellee is to dress up this history to look like a shilling shocker, he may do that with impunity so far as our prohibitive power is concerned; but in that event, we submit that he can make no appeal except to an audience which has never realized either that there are two sides to this history, or that, in fact, the appellee's history never happened at all. The events described in the shilling shocker never happened, and there is therefore no necessity to explain them; but the events recorded in this history did take place, and it is the business of this appellee to make them intelligible upon some theory calculated to prosper his contention—if he can.

We have said that in this brief may be found fallacious reasoning; probably, our reference in this regard was too favorable to the appellee; and this would seem to be so if the suggestion at the bottom of page 139, for example, be taken into the account. There, reference is made to the payment made to Mr. Bowers on October 1, 1913; and in that connection it is characteristically said that this payment *"it is asserted"* was made in a certain way. We describe this statement, that "it is asserted" that the payment was made in a certain way, as characteristic, because similar distortions of the rec-

ord are frequent in this brief, as any careful reader will observe, and will be referred to from time to time as this reply proceeds. In this particular instance, the statement is made that "it is asserted" that the Bowers payment was made in a particular way; we deny flatly the verity of this declaration; and we insist that instead of the manner in which this Bowers payment was made being a mere "assertion", it was a plainly and unequivocally conceded fact in the case. Mr. Noyes testified without contradiction that he drew $6000 of the Bowers payment from the Banking House of Herzog & Glazier in New York, through J. Barth & Company, of San Francisco; that he had a current account in New York several years old; that he had continuously from the first of January, 1913, up to the time he drew that $6000, as much as $6000 on deposit with that firm, and a great deal more, not always in cash, but part of the time in stocks that he had bought and speculated in (694-5); and he testified, and likewise without contradiction, that the balance of the Bowers payment was made by his check from his bank account here (684); and later, when the telegraphic transfer from Herzog & Glazier was referred to, and the $6000 Barth check, endorsed for account of the U. S. National Bank, of Ashland, Oregon, Mr. Bowers' home town, was produced, and when it was offered to bring a witness from J. Barth & Company to show the transaction, the concession was made by the present appellee that *"we do not question this transaction"* (700-1); and yet, in the face of the plain concession, the declaration is made in this brief that "it is asserted" that the pay-

ment to Mr. Bowers, was made in this particular way; and while this is but one instance out of many wherein a false color is sought to be thrown over the disclosures of this record, nevertheless, it is valuable as a warning and as illustrative of the extreme danger of taking the declarations of this brief at their face value. It is in this connection that a flight of sheer imagination is indulged with reference to this sum of $6000, and it is declared that the circumstance that Mr. Noyes should have $6000 in New York to draw on is no "indication" that he did not deposit in New York some of the very moneys paid him from the company here; there is, however, in this record no evidence that this appellee can lay his finger upon—and we challenge him to name volume and page, if there be—which gives the faintest color to this piece of guesswork. What, indeed, is the name of the witness who has testified to any fact in support of this statement? What is the number of the exhibit in this cause which justifies this flight of fancy? And when Mr. Noyes was testifying to the circumstances of this Bowers payment, when the Barth check was produced, and when the offer was made to produce a witness from the Barth Company to verify the transaction, why did not this appellee, instead of declaring "we do not question this transaction", produce a single fact or a single document to furnish a foundation for the fallacious attempt at reasoning here presented? If imaginings of this character are to be substituted for the plain facts contained in the record, our conceptions of the functions of an appellate court must undergo revision.

We have said that this brief indicates a new way to pay off old legal debts; and in saying that, we had in mind the attitude of the appellee in relation to the tracing of company funds into the purchase price of Section 5. In our opening brief, we endeavored to collate the facts and present the law upon that aspect of the case; we marshalled the facts, and we collected and cited the germane authorities; we referred to the authoritative rulings of the Supreme Court of the United States and of this court in support of our position that the burden of proving that company funds went into the purchase of Section 5 rested upon this appellee and that all doubts in connection therewith should be resolved against him; and we venture the opinion that we demonstrated that upon these vital propositions the complainant's case broke down. In view of all this, would not one expect some sort of a reasoned reply? If we misstated the facts, or if we misapprehended the law, should not some attempt have been made to set right the facts and to clarify the law? If our reasoning were fallacious, would not some attempt have been made to expose and defeat the fallacy? And yet, what reply is made to our views upon this topic? Will it be believed that all that we are confronted with are a few scattered generalities unworthy of description as coherent reasoning? Will it be believed that our views as to the facts are left practically untouched? And who, that does not see it with his own eyes on page 141 of appellee's brief would believe that our views as to the law bearing upon this topic have been met by the following crushing answer, "we do not so construe the law", and nothing more?

Could anything be more simple or more convenient than to brush aside unpleasant authorities by the bald declaration "we do not so construe the law"?

We have said that this brief misapprehends the case of *Cowell v. McMillin;* and in support of that statement we urge an analytical comparison between the case itself upon the one side and the references to the case contained in the briefs on file herein, our own as well as our opponents; and we cannot resist the feeling that should such a comparison be instituted, we should have nothing to fear from the result. But in passing, and as throwing further light upon the evident misapprehension of this cause by the appellee, we call attention to the bottom of page 165, and the top of page 166 of appellee's brief, where sundry authorities are cited as if they supported the proposition, "the facts heretofore stated constitute actual fraud", and where, after having cited those authorities, the statement is made, "cited in *Cowell v. McMillin,* 177 Fed. 43". Here, again, we encounter another of those instances wherein declarations made in appellee's brief cannot, with any degree of safety, be accepted at their face value. What, we may ask, would be the natural mental movement of the reader of appellee's brief, to whom *Cowell v. McMillin* was inaccessible? It seems to us that such an inquirer would at least assume that the authorities cited at the bottom of page 165 and at the top of page 166 of appellee's brief were "cited in *Cowell v. McMillin,* 177 Fed. 483" as determinative of that litigation; when we are told that certain authorities are cited in a decision, we naturally assume that such au-

thorities were cited in justification of the conclusion reached; if, upon the other hand, authorities are distinguished in an opinion, no one regards them as being the authorities upon which the courts rests its conclusion; and therefore to suggest that certain authorities are "cited" in an opinion, when in fact they are distinguished away, is to imply that which is not founded in verity. This, however, is precisely the situation which presents itself in appellee's present reference to *Cowell v. McMillin;* so far from the authorities referred to at the place mentioned in appellee's brief furnishing the foundation of the decision in that case, each and all of them were distinguished away by the court and in terms described as having no applicability to the issues there presented.

Another illustration of the general characteristics of this brief may be found in its treatment of the various witnesses who appeared at the hearing below. Here, again, we encounter the views of the extremist; every witness who was called by the appellee immediately became sanctified and invested with a halo; every witness who testified for the defendants became promptly enrolled in the battalion of demons; and it seems to have made no sort of difference what these witnesses actually testified to or to what extent their statements were confirmed or opposed by the documents in the case. That portion of the appellee's brief included between pages 187 and 195 presents the crudest of all forms of classification of witnesses; and instead of a rational analysis of the testimony of the witnesses, all possible virtues are attributed to those upon one

side, and all possible vices to those upon the other side. Surely, this method of treatment cannot appeal to any impartial investigator.

We said above that this brief dealt in ambiguous statements; and in support of that, we call attention, for example, to page 127, and again to page 143, where it is stated that Mr. Noyes was "the confidential agent". If any inquiry should be made into the details of this alleged confidential agency, having Section 5 in mind, no adequate reply can be extracted from this brief; if it be asked, "confidential agent as to what?", the answer is not forthcoming; but, as we think we established in our opening brief, unless Mr. Noyes was the confidential agent of the Presidio Mining Company as to the acquisition of Section 5, it is of no judicial consequence in what other direction, if in any, he occupied the relationship of confidential agent. And since this record fails to disclose, from beginning to end, the conferring upon Mr. Noyes by the Presidio Mining Company of any authority to acquire Section 5 for it, but the contrary, we feel that we are authorized in calling attention to the ambiguity lurking in the phrase "confidential agent". And in this connection, and as further illustrating the danger of accepting at their face value the statements contained in this brief, we call attention to the declaration made at page 144, where it is stated that "Mr. Noyes obtained Section 5 ostensibly for the company, as he himself, his brother, and Miss Doherty testified". We are compelled to say that we regard this statement as a plain perversion of the facts detailed in the record. The pleadings of the complainant himself, as shown in the opening brief,

make it clear, beyond all doubt, that he understood that Mr. Noyes acquired Section 5 in his individual right, and not for this company, whether ostensibly, or otherwise; repeatedly, in the pleadings of this appellee, may the statement be found that Mr. Noyes (not the company at all), was the owner of Section 5; and the whole theory which permeates the appellee's pleadings is that while Mr. Noyes acquired Section 5 individually, yet he acquired it under such circumstances and conditions that he should be charged therewith as a trustee for the company. When we turn to the testimony, we find no evidence on behalf of the appellee which shows that Mr. Noyes acquired this section "ostensibly for the company"; and when we turn to the testimony of Mr. Noyes himself, his brother and Miss Doherty, we observe how Mr. Noyes originally brought this section to the attention of the principal stockholders of the company, urged its acquisition upon them, and when they refused to move in that matter, he acquired the section for himself in his individual right. And the testimony further shows that immediately upon acquiring it, he issued to each of the stockholders, including this very appellee, the annual report of 1913, wherein his individual ownership is openly declared, and wherein he takes a position entirely at war with the existence of any trust in that section in favor of this company. There can be no qualification of these facts; and when they are viewed with any degree of sanity, the claim that Mr. Noyes acquired Section 5, "ostensibly for the company" is seen to be a claim unworthy of serious consideration.

We have said above that among the general features of this brief was that of wilful misleading; and in support of this statement we wish to call attention to at least one illustration,—an illustration of such a character as to repel the thought that the statement which we complain about was accidental. On page 150 of this brief, *ad finem,* the statement is actually made that "there is no documentary proof adduced by the defendants showing the ownership or transfer to Noyes of said stock",—referring to the Osborn stock; and following this and as a corollary thereof, it is urged on page 151 that therefore "the fact is, he (Mr. Noyes) never was the owner of one-half of Osborn's stock". Upon what principle, consistent with common fairness and sincerity, can considerations of this character be addressed to this court? The implication is that there is no documentary proof establishing either the ownership by Mr. Noyes of the Osborn stock, or the transfer to him of that stock; and since that implication is sought to be urged upon this court by this appellee, when this appellee himself was the very person who not only asserts these things in his pleadings, but also produces that precise documentary proof, what sort of opinion can any fair man have of the reliability of any argument presented in this brief? And yet, the fact is that the documentary proof establishing the ownership of this stock in Mr. Noyes, and the transfer of this stock to Mr. Noyes, was produced by this very appellee himself. At page 505 of the record, the appellee produces certain pages of the stock journal "showing the transfers of stock"; "this exhibit presents the page just exactly as it is"; "that gives the entire history

practically of certain stock transactions in this case"; and on page 506, the transcript of the stock journal, this appellee's exhibit, is set forth, exhibiting the ownership of the stock mentioned by Mr. Noyes, and the transfer of that stock to him. Where a fact is proven by one's opponent, where that fact becomes an accepted fact in a cause, where it is eliminated from the region of controversy, and that, too, through the instrumentality of one's opponent, with what sort of good faith can that opponent, after one has accepted and relied upon the fact, turn about and charge that there is no proof of the very fact which he himself has established in the case? Do methods like these commend the case in aid of which they are employed? Or, by such methods, may not one say that "any suit is discredited" (*Wall v. Anaconda M. Co.*, 216 Fed. 242, 245; affirmed *sub nominee Wall v. Parrott Copper M. Co.*, 244 U. S. 407)?

Up and down through this brief sundry straw men gaily march (compare 156-7, 228), but their evolutions are not of interest, if the main ideas of our opening brief be correct; and as frequently occurs, apprehensions are conjured up as to what might or might not be done, or what might or might not happen, in certain imagined predicaments. But we submit that no extreme statement, no hypothetical conjecturality is welcome in a legal discussion. It is to be regarded, we think, that this method of argumentation is only too familiar; it is not by any means an uncommon thing for appellee to slip the leash from a riotous imagination, conjure up some extreme case, or some extreme phase

of a case not actually visible in the pending situation, some harrowing possibility, and then propound intricate conundrums based upon such extreme imaginings to an astonished court; this sort of thing is quite facile of accomplishment, but does not commend itself to practical judges. Something of this sentiment inspired the observations of Mr. Justice Barnes, when he remarked:

> "In construing a statute it is hardly fair to begin by conjuring up a lot of ghosts or by setting up straw men so as to indulge in the pleasure of knocking them down. When we let loose our imaginative powers, there is hardly any limit to the heights to which we may soar or to the depths to which we may descend. We can imagine that Roosevelt will insist that Taft is the logical candidate for president at the next election, or vice versa; or that the English Parliament will soon pass a vote of confidence in the Kaiser or in G. Bernard Shaw, or that the English and German governments will agree on who was responsible for starting the war, or that the present war will be the last one; or even that a constitutional government will be established in Mexico within the next half a century. But a statute should not be compelled to run the gauntlet of any such far-fetched possibilities."
>
> *Husting v. Board of State Canvassers,* 159 Wis. 244.

And when this procedure was recently attempted before the Supreme Court, that learned body brushed aside the attempt with the remark "we are not now concerned with the extreme cases which are hypothetically presented" *(Atl. Trans. Co. v. Inbroveck,* 234 U. S. 52, 61). And we respectfully urge that any attempt in this cause to import into it these imaginary possibilities should likewise be frowned upon.

Without pursuing this topic further, attention may at least be called to one further general feature of this

brief, which, again, supports our suggestion that the declarations of this brief are not to be taken at their face value, and are misleading in the extreme. The illustration to which we refer will be found on page 136 of this brief, and we here quote the passage in question:

> "We have here a conflict of testimony. William S. Noyes, B. S. Noyes and Miss Doherty all say that William S. Noyes offered the property (Section 5) to the company to be taken by it at any time the company saw fit to do so, at its purchase price to him. As to his offering the property to the company, two of the defendants, Peat and Osborn, stated to Capt. Overton that they knew nothing about an offer to the company, or when it was offered, if at all."

This is what we feel justified in describing as a characteristic passage in this brief; and for more than one reason, a man should no more be proud of refuting it than of having two legs. Without seeking to put the desire to state facts correctly upon any particularly high plane of professional morality, but looking at the matter from a purely utilitarian point of view, one would suppose that the only course open to the litigant is to endeavor to the best of his ability to state the facts correctly, and that the commonest kind of common fairness both to one's antagonist and to the court requires that the facts should be fairly stated; and in view of this, it is extremely difficult to find any rational explanation for the position taken in the passage just quoted. In the first place, the reproduction of the alleged disclosures of Peat and Osborn to Overton is in itself a most indefensible departure from the record. The brief declares in plain terms that they

"stated to Capt. Overton that they knew nothing about an offer to the company"; and yet, when we turn to the testimony of Overton, we find nothing of that kind stated by him, nor anything approaching anything of that kind; on the contrary, it appears affirmatively that in his conferences with Osborn and Peat, the offer of Section 5 to the company was taken for granted by all concerned, and that the only feature of the matter that, according to Overton, was any way uncertain, was the date when the conceded offer was made, and the sum for which the section was offered to the company. The following is the testimony of Overton upon this subject-matter; and we respectfully insist that there is nothing whatever in this excerpt to justify the statement that Messrs. Peat and Osborn stated to Capt. Overton that they knew nothing about an offer to the company:

> "I tried to find out from Mr. Osborn how much Section 5 had been offered to the Presidio Mining Company for, and when. I told him I could find no records for that, he told me he did not know when the offer was made, or for how much, I would have to see Mr. Noyes about that.
>
> Mr. HARDING. I ask that that be stricken out.
>
> The COURT. Motion denied.
>
> The WITNESS (continuing). Mr. Osborn said that there was no record in the office, but there probably might be some memorandum in Mr. Noyes' office, about his offer of Section 5 to the Presidio Mining Company. I did not go to see Mr. Noyes. I told him that Mr. Noyes could see me in the Presidio Mining Company's office, but I did not care to go to Mr. Noyes' office. Mr. Osborn was the only one of the defendants who threatened me. Mr. Peat had conversation with me relative to these matters, and told me he did not know when Section 5 was offered to the Presidio Mining Company, nor for how much. I could not find out. I was trying to find out how much Section 5 had cost, and could not find out from either Mr. Osborn or

> Mr. Peat. Mr. Osborn told me that there was no record of that unless it might be a memorandum in Mr. Noyes' own office. I looked over the records thoroughly; I did not find anything. I found nothing in the minutes at all, where it says how much it was offered for, or where it was offered; it simply says in the minutes of November 19th, that it had been offered, but there is no record where that is found'' (Transcript of Record, pages 586-7).

Nor is this all, in connection with the passage above quoted from appellee's brief. Not only does the passage in question seek to leave a false impression with reference to this offer of Section 5 to the company, but it is a verification of the statement which we made at the opening of this reply brief to the effect that not only were the appellee's principles false, but even upon those false principles he was unable to reason logically. In the passage in question we are told that ''we have here a conflict of testimony''; and what is the ''conflict of testimony''? The obvious effort is to discount the thought that Section 5 was offered by Mr. Noyes to the company; the appellee clearly appreciated the importance of that action on the part of Mr. Noyes; and the passage in question shows he does not hesitate to descend to misrepresentation in his effort to force that idea into the minds of this court. Where, then, is the ''conflict of testimony'' upon this important point? It appears from the passage quoted that while, upon the one side, there is concurrent testimony of three witnesses to a given fact, on the other side there is the unsupported (but as we have seen untrue) testimony attributed to two other witnesses that they ''*knew nothing* about an offer to the company''; where is the ''conflict of testimony'' here? If three witnesses testify

that at the time when a shot was fired a man wearing a brown hat stood on the corner of the street, and two witnesses declared that "they knew nothing" concerning that subject-matter, where is the "conflict of testimony"? How can he who "knew nothing" about a fact be said to be in conflict with those who testify directly, positively, clearly and unmistakably to that fact? Where affirmative knowledge upon the one side is confronted by alleged ignorance upon the other side, is there any "conflict of testimony"? It seems idle to analyze this thing; and were it not that we are anxious that the declarations in this brief, of which this is but an exemplar, should not be taken at their face value, we should pass by this passage with the silence that it deserves.

THE BURDEN OF PROOF.

Not only does the burden of proof rest upon the accuser, but before one can be called upon to explain a transaction, or its fairness, such a transaction must be established as required an explanation either of itself or of its fairness.

The claim is made in the appellee's brief that the directors of the defendant company, because dominated by William S. Noyes, must show their acts and transactions to be fair; and it is asserted that this rule particularly applies to Mr. Noyes because he contracted with himself while in an official position and in a fiduciary relation. This claim, however, begs the question in the case; it calmly assumes the very matters in issue. We deny that these directors were "dominated" by Mr. Noyes; we deny that Mr. Noyes "contracted with himself while in an official position and in a fiduciary relation",

or contracted with himself otherwise; and we insist that some rational foundation be laid, some rational proof be made, of these propositions, before any duty to explain fairness (assuming that there was any such necessity) can be impressed upon any of these defendants. The cases cited by the appellee all presuppose the precise matters which are in controversy in this cause; we have no difficulty in conceding that, in a proper case, and where a proper foundation for the claim shall first have been duly laid, a duty to show fairness may arise; but we insist that in the cause at bar we are not confronted with such a case. What, indeed, was the transaction which calls for its justification by its fairness? What acts had William S. Noyes done that he should show the fairness of those acts, at the behest of a single stockholder in this company? What duty owed by Mr. Noyes to this company as to Section 5 had he breached, that he should show the fairness of his acts in connection therewith? What duty to the Presidio Mining Company was Mr. Noyes under, all of the facts considered, which would be inconsistent with the character of purchaser on his own account of Section 5? When it is said that a man must show fairness, the obvious assumption is that some act of his was or is of a character which calls for the proof of fairness; what, then, was that act? And upon whom rests the duty of establishing such act? Clearly, the act in question was not the mere circumstance of the purchase of Section 5; no law prohibits an employee of a corporation from purchasing a piece of real property; other and additional features giving a special aspect to the transaction, must be established, and established by

the actor in the litigation; what were they? Did Mr. Noyes frustrate any of the plans of this company with reference to Section 5? We know that this company had no plans with reference to that section. Did Mr. Noyes make a secret, hidden purchase of Section 5 with knowledge of any plans of this company which involved that section? We know that the purchase was not secret, that it was made pursuant to an antecedent declaration of intention (682-3, 813-4, 817), that it was made perfectly openly, that the fact that it was to be made was thoroughly well known to the principal stockholders of the company, that when it was made the facts in connection with the transaction were published to every stockholder in the company, and that the purchase was not made with knowledge of any plans of the company involving the section in question, for the sufficient reason that the company had no such plans. When the purchase was made, was Mr. Noyes then the agent of this company for that purpose? We know that he was not, that he never was deputed by the company to transact any such business, that during the long years of this company's corporate history it had never manifested the slightest intention to acquire the section, and that it never appointed Mr. Noyes, expressly or otherwise, as its agent to acquire this specific tract of land. Was the section purchased by the use of company funds? We know the desperate financial condition of this company at the time of this purchase, that it was wholly unable to make the purchase, that not only was its treasury depleted by the peculations of Osborn, but every dollar it had was swallowed up in the new cyanide plant which alone saved it from

ultimate destruction, and which was itself established upon credit secured by Mr. Noyes; and we know, further, that this appellee has wholly, completely and utterly failed to trace into the purchase of Section 5 one dollar of the funds of this company. Was this purchase made upon the company credit? We know that the leading banker of the vicinity—the only banker in the vicinity that the record advises us of—flatly declared that at the time of this purchase he would lend no money to this company without additional security, that the cyanide plant was installed upon credit, and that the Wells Fargo Nevada National Bank in San Francisco refused to loan to this company the money that it needed unless and until a personal and individual guaranty was given it. One might, indeed, go on thus enumerating features of this situation, not one of which has been established by this appellee; but until some such foundation is laid, no transaction is proved which calls for an explanation of its fairness. If, for example, it had been established that Mr. Noyes had actually been constituted the agent of this company for the specific purpose of acquiring Section 5, and thus charged with that specific duty, and that in violation of such duty he had surreptitiously acquired the section for himself with the purpose of thereafter disposing of it to the company at a greatly advanced figure, one could understand why he should be called upon to explain his conduct and to show its fairness. But we respectfully insist that until this foundation is laid the presumption must remain that, as the California Code of Evidence puts it, private transactions are fair and regular (C. C. P., 1963, sub. div. 19).

Nowhere does the appellee get away from the unfortunate circle in which he reasons. To establish a trust in Section 5, he must commence somewhere. Somewhere must he establish a fact from which a trust may be inferred. He may do that either by commencing with Section 5 and showing that the Presidio Mining Company had some right, title or interest therein, either vested or in expectancy; or, that Mr. Noyes was delegated by the company to acquire for it such right, title or interest. Having failed in that, the appellant is relegated to the other horn of the dilemma, namely, he must show that the fund with which Noyes purchased Section 5 was the money of the Presidio Mining Company. In this mode of attack, the appellee may proceed, if he can, to show that the money of the company was presently, at the very moment of the purchase, used by Mr. Noyes in the purchase. He would thus establish a resulting trust in Section 5. But this mode of attack was abandoned by appellant in his supplementary bill of complaint, and repudiated in his brief in this court (p. 129), and we are not concerned with this proposition.

It being conceded by appellee that Mr. Noyes in the first instance borrowed the money with which he purchased Section 5 from third persons, he must earmark any subsequent money received by Mr. Noyes from the company and trace it dollar by dollar and cent by cent into the repayment of Noyes' borrowed money. To do this, the appellee has made no effort, and concedes that he is making no effort to do this. Whether, therefore, appellee looks to the property for a foundation for a

trust, or whether he looks to the fund for the foundation of a trust, he finds himself at the end of the trail with the object of his quest not in hand.

So what does he do? He blandly assumes what the law compels him to prove, namely: that Mr. Noyes ultimately paid for Section 5 with moneys which he received from the company, and that, too, in the face of the uncontradicted and corroborated evidence of Mr. Noyes that he repaid these loans with money other than that received from the company. Appellee's position, stating it unduly sympathetically, is baldly this: because at some time subsequent to his purchase of Section 5, Mr. Noyes received funds from the company as his one-half of the net proceeds of the ore delivered from Section 5 to the company, therefore, the company paid for Section 5 and it is its property. The appellee does not perceive the breach in his argument, and again assumes a fact which he has not shown, namely: that the money so received by Noyes was wrongfully received. As we have said, ~~equity~~ equality is equity, and no fault can be found with the fact that the company divided half and half with Noyes the net profits of the ores mined from Section 5. So when appellee arrives at this arc in his psychological circle, he finds a break in it, which he can neither jump or span.

But had appellant traced these moneys so received by Mr. Noyes from the company into the purchase price of Section 5, dollar for dollar and cent for cent, it would avail him nothing. If the original purchase of Section 5 by Mr. Noyes was rightful, then

the payment of these moneys to Noyes was rightful and what he did with them is of no consequence.

If the original purchase by Noyes was rightful, there can be no trust. If the payment of the moneys by the company to Noyes was rightful, there can be no trust.

If both the original purchase and the payment of moneys were rightful, there can be no trust, and where does appellee show that either was wrongful? Can he be permitted to assume the precise foundation that he is called upon to establish by clear and convincing evidence?

FRAUD AND CONSTRUCTIVE TRUST.

Merely to argue that Mr. Noyes was, as superintendent of mining operations, under certain duties to this corporation, is to argue nothing: what is necessary to be established is that he was under a duty to this corporation as to the specific parcel of realty, Section 5; and whether Mr. Noyes was under any duty either to purchase Section 5 for the corporation, or to refrain from purchasing for himself, depends, inter alia, upon whether any fiduciary relation actually existed between him and the corporation quoad Section 5 itself, whether the corporation had any interest actual or in expectancy in that section, and whether the purchase of that section by Mr. Noyes hindered or frustated any plans of the corporation (if it had any plans in that regard) for developing the business for which it was created; none of these essentials, however, has been established here.

In our opening brief, at various places, we gave attention to this subject matter of fraud and constructive trust, especially at page 306, and following: but no practical attempt is made in the appellee's

brief to meet the views there formulated. At page 37 of the appellee's brief, and at pages 55 to 66 thereof, some generalities are set forth, but nothing which is applicable to the cause at bar, or which attempts to meet the questions here raised. Where, indeed, is the utility of citing such a case as *Dorsey Machine Co. v. McCaffrey* quoted from at page 37 of the appellee's brief, in a case of this kind? Did not Mr. Noyes express to the leading stockholders, in the fullest manner, his views concerning the acquisition of Section 5? Did he not urge upon them the proposition that this section should be acquired by the company? And when he obtained neither aid nor comfort from them in this matter did he not, openly, and in pursuance of his antecedently announced intention, purchase that section individually, and then expose all of the facts in connection therewith, including the agreement for the equal division of the net, to all of the stockholders, through the annual report of 1913, produced upon the trial below from the possession and custody of this appellee and filed in the cause as his exhibit 17? Where are, indeed, the affirmative acts of concealment in the cause at bar, of which so much is made in *Dorsey Machine Co. v. McCaffrey?* And, to take another hint from *Dorsey Machine Co. v. McCaffrey*: assuming (in the face of the Klink Bean report that "the arrangement has, on the whole, been a benefit to the company" (988)) that any of the acts or conduct of Mr. Noyes in connection with Section 5 has "injured" this appellee, let us observe that, to paraphrase *Dorsey Machine Co. v. McCaffrey,* the injured party has not remained in ignorance, without fault

or want of diligence on his part; on the contrary, from 1908, when he was given his stock in this company by a donor who desired to avoid corporate liability, to 1913, when he received the annual report of October 6th, he steadily slept upon any rights that he may have believed himself to have; and then, in 1913, when he received the annual report, which disclosed all the facts relative to Section 5, this active, enterprising, diligent, fully informed appellee simply rolled over in bed and continued the sleep which originated in 1908, and continued that sleep until July 26, 1915—is there here that ignorance, that absence of fault, that absence of the want of diligence which is referred to in *Dorsey Machine Co. v. McCaffrey?*

Between pages 55 and 66, certain elementary generalities are collected without anything to point their applicability to the cause at bar. Of what utility is it to announce to us that complainant's position is this or that or the other position; what is required is that the complainant should, not merely announce his position, but, by tangible and concrete evidence, make that announcement good; but here, the complainant breaks down. On page 58, for example, we are advised that "our position is that William S. Noyes was the confidential and trusted employee, agent and superintendent of the Presidio Mining Company, on whose shoulders rested the burden of conducting the company's affairs for a great many years prior to 1912". What does all this mean, having regard to the specific issues in this cause? Is there any proof in this cause that Mr. Noyes,

prior to the last days of January, 1913, held any other position in this company than that of superintendent? The actual mining operations aside, what agency does this record disclose to have been at any time entrusted to Mr. Noyes? Is there any pretense anywhere in this cause that he was appointed agent of the company for the purpose of purchasing Section 5? If any such evidence exists in this record we challenge its production; not the production of riotous imaginings, but of specific and immediate facts. At what meeting of this company was Mr. Noyes constituted such an agent? What was the date of the meeting? Who made the motion? What was the motion? What was the scope and what were the limitations of the asserted agency? What page of the minutes discloses the transaction? And in this very same passage the statement is made that the burden of conducting the company's affairs for a great many years prior to 1912, rested upon Mr. Noyes' shoulders: the mining operations aside, where is the proof of this? Was Boyd a nonentity? Did Mr. Noyes superintend the San Francisco bookkeeping also? What was the specific burden, actual mining operations aside, which rested upon Mr. Noyes' shoulders? We protest, and we protest again, against this method of making these extravagant assumptions without tangible facts to support them; and we invite a critical analysis of all such declarations wherever encountered in this brief.

In this portion of the brief, cases are cited which deal with the reposing of confidence by one person in another. When did the Presidio Mining Company ever repose any confidence in William S. Noyes as to the acquisition

of Section 5? When did the Presidio Mining Company ever entertain the intent to acquire that section? The low grade ores in Section 8, the high cost of reduction by the antiquated pan-amalgamation method, the absorption of its 1907-1912 earnings in the purchase of the internal combustion engine and indispensable repairs at Shafter, the imperious necessity of supplanting the pan-amalgamation method by the modern process of cyanidation, the peculations of Osborn, the meagre remnant of five or six thousand dollars that was swallowed up in the establishment of the cyanide plant, the significant necessity that this plant should have been established upon credits secured by Mr. Noyes, Mr. Noyes' own loan of $10,000 to this company, the refusal of the company's San Francisco bank to make required loans unless given the personal guaranty of members of the present administration, the declaration of the director of the Marfa National Bank that he would make no loans to this company without additional security,—all these features and others that might be added, demonstrate the grotesque absurdity of the thought that this company then possessed the financial ability to acquire Section 5, even if it entertained the intention of doing so; upon what basis, then, could it look forward to the acquisition of a tract of land which it was unable to purchase, or commission Mr. Noyes as its confidential agent to acquire that tract? And since when has the confidence referred to in the books become synonymous with unsympathetic frigidity? Did any of the leading stockholders of this company invest Mr. Noyes with their confidence by authorizing him to acquire this land for the company, or did they meet his suggestions in that

regard with coldness, aloofness and a refusal to co-operate or contribute? A fair analysis of the evidence disclosed in this record, will, we think, satisfy any open-minded investigator that so far from this confidence being an element in the relations between Mr. Noyes and the principal stockholders, it was conspicuous by its absence. No one can study, we submit, this record without perceiving that the attitude of these stockholders was not the attitude contemplated in the decisions to which we have referred; and it is clear, not only that Mr. Noyes was not their confidential agent, or the confidential agent of this company, in this matter of the acquisition of Section 5, but also that he was not an agent at all.

In the passages quoted from Bispham at the top of page 57, reference is made to two persons standing in a confidential relation "touching the subject matter as to which the fiduciary relation exists"; what evidence have we here of the existence of any fiduciary relation between this company or its stockholders and Mr. Noyes touching the subject matter of the acquisition of Section 5? In the passage quoted from the Taylor case, at the top of page 58, it is declared that there must be some relation between the parties which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But what relation existed between Mr. Noyes and this company as to the acquisition of Section 5? When did Mr. Noyes fail to make a full discovery, both of his opinion that the section should be acquired by the company, and then upon meeting with a lack of confidence in that regard fail to disclose his antecedent

declaration of intention to acquire the section himself, and then, within a brief period after obtaining the deed to the property, fail to disclose to every stockholder of the company the entire situation? Is a project selfish wherein the primary effort of the advocate of the project was to benefit, not himself, but his company? Is a project selfish wherein a tract of land is acquired openly by an individual after his efforts to cause his company to acquire the same have met with failure?

In the passage quoted from Pomeroy, on page 61, and also quoted from Perry, on page 62, the general rule is referred to that where the legal title has been acquired through actual fraud, misrepresentation, concealment, or under other circumstances,

> "which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest"

equity will act; but, what circumstances have been established in this cause to render it unconscientious for Mr. Noyes to retain and enjoy the beneficial interest in a tract of land which he had vainly endeavored to induce the company to purchase, which the company confessed its financial inability to purchase, which he purchased himself openly and publicly pursuant to an antecedently announced intention to do so, the purchase of which, and all the circumstances connected therewith, he published to every stockholder, and a tract of land concerning which he thereafter made with the Presidio Mining Company precisely the same sort of contract which this appellee employs in operating his own farms back East (608)? We respectfully submit that just conclusions upon this cause are not to be reached through subservience to generalities, disregarding the

actual facts themselves. We submit that by assiduously studying the history of this enterprise, by sifting the evidence of facts, by carefully combining and contrasting those facts which are authentic, by generalizing with judgment and diffidence, by perpetually bringing the theory that is in process of construction to the test of the relevant facts themselves, correcting or abandoning that theory accordingly as to the facts prove it to be partially or fundamentally unsound, and proceeding thus —patiently, diligently, candidly,—a conclusion can be reached which shall be just under the law to all concerned. But this consummation cannot be achieved by yielding to mere generalities.

In our opening brief, we argued that directors of a corporation are not held to supernatural diligence, that they are required to exercise that degree of diligence only which is employed by prudent men in their own affairs, that in this department of the law, as administered by modern courts, the ultimate test of the propriety of acts, conduct and contracts is their fairness, and that, taking together the history before us, and giving due weight to all of its retrospective, concomitant and prospectant features, no unfairness is discoverable; and we argued that the contract of November 19, 1913, in which the prior tentative arrangements had become merged, and which undertook definitively to establish the relations between the parties, was intrinsically a fair contract, that its fairness was supported by relevant, equitable considerations, and that a contract of this nature was sufficiently fair to be adopted by the appellee himself in the management of his farms back East (608); and so well recognized is this test of fair-

ness that even this appellee, extremist as he is, is unable to substitute for it any other more stringent or drastic test (see his brief, for example, at pages 68, 100, 142, 147). So well grounded, indeed is this test of fairness, that, in a case cited as authoritative in *Cowell v. McMillin,* 177 Fed. 25, it was held that where a sale by directors of their own property to a corporation was open and fair, and at a reasonable market price, and the transaction was entered in the books and known to the stockholders, it is valid (*Figge v. Bergenthal,* 109 N. W. (Wis.) 581, 588); and in the same case, upon rehearing, it was held that an

> "officer of a corporation may sell to the latter so long as he acts openly and does no injury to the corporation and is within the scope of the corporate business of the corporation",

and it was further held that while transactions wherein the officer has a personal interest will be carefully scrutinized, yet,

> "the contract must stand or fall on the bona fides of it, and not on whether the corporation wins or loses by or because of good or bad business policy on the part of the officers of the corporation" (110 N. W. 798, 800), * * *

views which are recognized by the California cases also (*Herbert Kraft Co. v. Bryan,* 140 Cal. 73, 79; *Schnittger v. Old Home Mining Company,* 144 Id. 603; *California, etc. Land Co. v. Cuddeback,* 27 Cal. App. 450).

COMMENTARY ON FACTS.

References to the facts of this cause as contained in the appellee's brief fail to sustain the decree appealed from.

We regret to say that we are unable to discover any logical arrangement of topics in the appellee's brief;

we find it confused and inconsecutive; and if in the commentary which we are about to offer relative to the facts in the cause, as those facts are referred to in this brief, we shall ourselves be found to be more or less inconsecutive and desultory, we can only plead in extenuation that this is an unavoidable consequence of the characteristics of the brief under consideration. We shall endeavor, however, to collect together, as best we may, under appropriate headings, references which are scattered here and there throughout the appellee's brief; it is quite possible that we may overlook some of these references; but if so, the oversight will be quite unintentional.

PERSONALITY OF MARTIN AND OVERTON:

The purpose of this solitary complainant is to further his personal desires; Martin has never displayed any "active interest" in this corporation, its affairs or its litigation; and the present proceeding does not reflect the views or wishes of the stockholders generally.

In our opening brief, between pages 2 and 7, we endeavored to make clear the proposition that the present cause is essentially a "one man case" designed to further the personal desires of a single individual only, and that it does not reflect the views or wishes of the stockholders generally; and in that connection, we called attention to the individual activity of Overton, upon the one side, and, upon the other side, to the apathy and complete lack of interest, not only of Martin, but of all the other stockholders, whether minority or majority, so far as any expressed sympathy with the purposes of this suit was concerned; and we endeavored to emphasize the point by referring to the views of respectable

courts, both state and federal, bearing upon this point. In doing this, we have, as was our duty, confined ourselves to the record before us, upon which record, and upon which alone, we are bold enough to believe, this court will decide this cause These criticisms of ours have had the effect, however, of provoking from the appellee a panegyric of himself, of the silent Capt. Martin and of the father-in-law of the appellee; but that panegyric was based upon nothing which is contained in the record before us, so far as we are able to ascertain; on the contrary, there is here a very plain and equally flagrant departure from the record in the effort to attach to the persons referred to a factitious importance. The appellee is referred to on page 77 as "the principal complainant"; but the record in this cause disclosed no other real complainant, Martin being the veriest and merest figurehead, and no other stockholder, whether minority or majority, intervening in the cause in sympathy with the purposes of the bill. And in speaking of the appellee, reference is made to page 5 of the record, which not only deals with a matter of pleading rather than proof, but which is entirely silent as to the personality of the appellee; and the reference is further made to page 79 of the record, which likewise deals with a mere matter of pleading rather than proof and which is likewise entirely silent as to the personality of the appellee. It is alleged at pages 1 and 2, in the original bill of complaint that the appellee is a retired Captain of the United States Army, and that Captain Martin is a Captain of the United States Army at present on duty at Ft. Leavenworth, Kansas; but after this original bill of complaint became superseded and amended and sup-

plemental bills were filed in the cause, no allegations appeared therein to show that either the appellee or Captain Martin was an officer in the United States Army. Assuming, however, that in the pleadings upon which the cause was tried any statement was made that either the appellee or Captain Martin was an army officer, it is extremely difficult to understand, and we confess our total inability to understand, what that fact or circumstance would have to do with Boyd's conduct in transferring his stock to Osborn, or the conduct of Osborn in carrying out the wishes of Boyd by giving Mr. Noyes an interest in that stock, or with the acquisition of Section 5 by Mr. Noyes as developed in the transcript of record, or with any other material fact or circumstance in this controversy; whether the appellee or Captain Martin either was or is an army officer, can throw no light whatever upon the correct resolution of the issues in this cause, nor make Mr. Noyes a trustee if the facts do not demand that result; and this feature of the personality of the complainants, both real and nominal, as referred to in this appellee's brief, has in our opinion as much relevancy to the issues in this cause as the composition of the Amphictyonic Council which presided over the controversies of ancient Greece. It is in this connection that the statement is made relative to the "long and successful career of the appellee" and to the "many years in active service" attributed to Capt. Martin; and we here learn for the first time, and equally independently of the disclosures in the record, that "Captain Martin is now a Colonel"; but upon what authority these statements are made, we must confess our ignorance. We have been wholly unable to find

anything in this record to authorize these statements; we find nothing in them which replies to our strictures upon this cause as being a one man case; and we point to these departures from the record as but another instance of the truth of our criticism that the declarations of this brief are not to be taken by the court at their face value. So, on page 78, we find another statement equally without justification in this record, viz., that General Anson Mills was retired after "serving an honorable career over many, many years". A careful search of the record before us fails to reveal any authority for this statement; the statement in itself has no importance so far as any of the real issues in the cause are concerned; and it is a remark wholly outside the record and intended to attribute to the person in question a professed importance which the record in the cause does not attach to him.

In this connection, and as illustrative of the extreme danger of taking at their face value the declarations of the appellee's brief, we desire to call attention to a most extraordinary statement on page 77. It is there said that "the statements in the brief that he (Captain Martin) has never contributed anything to the expense of this case, nor lent his moral support is unqualifiedly false because Colonel Martin has done both"; and this statement is as wide of the record in this cause as its grammar is bad. We submit that no conscientious litigant would thus seek to impose upon this court a fact so flagrantly without support in this record; and we challenge this appellee to lay his finger upon the page of this record which shows either that Capt. Martin has

contributed a single penny to the expense of this cause, or has lent his moral support thereto. We challenge this appellee to lay his finger upon any page in this record which states that Capt. Martin "has done both". And we assert that the keenest examination of this record will demonstrate the utter absence of any evidence whatever establishing either of these asserted facts; and we insist that this is but another instance wherein direct statements are made in this brief without a particle of evidence in the record to justify them.

In view of what may hereafter be said, it seems not wholly irrelevant to refer to the statement on pages 94-5 of the appellee's brief, where an explanation is made of a statement in paragraph 16, not of the amended or supplemental bill upon which the case was tried, but of the original bill of complaint which was eliminated by Judge Dooling upon demurrer. There, the appellee referring to a document which had passed out of the case as a pleading, speaks of conferring with "the other complainants herein", followed, on page 95, by the bald and unwarranted assumption that certain persons there named were, in fact, "the other complainants herein", —an assumption demonstrated to be unwarranted by the circumstance that, aside from the present appellee, not a single other stockholder, whether minority or majority, has intervened in this cause in sympathy with the purposes of the bill. It is to be observed in this connection, moreover, that this passage in the original bill of complaint was deleted from the amended bill, but no notice of that circumstance is given on pages 94-5 of the appellee's brief. It is further of interest, at this juncture, to inquire who were these persons enumerated

on the top of page 95 of this brief, with whom, according to this original bill, the complainant Overton "conferred"; and when we turn to his testimony, at page 583, we find that after he had returned home to Maryland, "I wrote to members of my family who had large sums involved and proposed to raise a fund for an investigation"; were, then, the persons enumerated at the top of page 95, "members of my family", and did they accede to the appellee's proposal "to raise a fund for an investigation"? We know that they did not intervene in the cause—that they had not sufficient sympathy with the purposes of the bill to carry them that far; we know of no evidence whatever that they subscribed to "any fund for an investigation"; were these people, then, "members of my family"? The persons named are Kathleen C. Kline and Lelia Kline, General Anson Mills, Katie C. Stewart, Samuel Clary and Webster Thayer, Trustees, and William W. Smiley, Trustee. And in this connection it may be pointed out that while the Mills correspondence shows that Overton, Martin and Kathleen C. Kline received among them 16,000 shares of the Mills stock, leaving Mills with 1000 shares, yet there is nothing in the record which we have been able to discover which identifies any person as being among "members of my family" save and except Anson Mills himself, between whom and the appellee there is a relationship by marriage. So far as we are authorized by our researches to make the statement, we submit that the only possible inference deducible from this record is that the only discoverable "member of my family" is Anson Mills himself. So far, then, as any reasonable inference can be predicated upon the disclosures of the

record, Anson Mills is the person whom we must look to when references are made to "my family", or "our family". But, the statement is made at page 254 of the appellee's brief to the effect that the interests of the appellee "have cost appellee's family $60,000 of real money",—a statement which, we submit, is quite without a particle of competent evidence to sustain it. When we turn to something more specific and particular in this connection, and look at page 78 of the appellee's brief, we there discover that "it also appears in the record that General Mills' family, including Captain Overton, Colonel Carl A. Martin, the Kline family and Orndorff paid $60,000 cash for their stock", citing page 579 of the record in support of this statement. But the first observation which we desire to make concerning this declaration is that there is no proof in this record which we have been able anywhere to discover showing that "Colonel Carl A. Martin, the Kline family and Orndorff" are, even by marriage, members of "General Mills' family"; and until we are satisfied by competent evidence of the verity of this fact, we shall continue to be guided by the well settled maxim *quod non apparet, non est.* In a word, the statement that "Colonel Carl A. Martin, the Kline family and Orndorff" are included in "General Mills' family" is a statement wholly unsupported by a scrap of evidence in this record. There is evidence that Captain Overton is connected by marriage with General Mills; but beyond that, the evidence does not go, so far as we are able to discover. And in the next place, we find no evidence whatever that these people just mentioned "paid $60,000 for their stock", or any other sum. So far as "Captain Overton, Colonel

Carl A. Martin, the Kline family and Orndorff'' are concerned, we know that they were given their stock by General Mills, and there is no proof that any one of them ever paid a single dollar for a single share of the stock given them by General Mills. So far as the person described as ''Orndorff'' is concerned, the record is entirely silent as to when, where, how, or for what consideration that person acquired any of the stock of the Presidio Mining Company; certainly, there is no proof that that person paid $60,000 or any other sum whatever for the stock standing in that person's name. And when we turn to page 579 of the record cited in support of the statement just criticised, we there find the following bald conclusion by the witness Overton upon this subject: ''the amount of invested capital that my family and connections have put into the Presidio Mining Company as an investment is in the neighborhood of $60,000''. Apart from the delightful indefiniteness of the expression ''in the neighborhood of $60,000'' we wish to point out that what is here stated was not, so far as we can gather from the record before us, a fact within the knowledge of the witness Overton. As we have seen, the only discoverable ''member of my family'' is Anson Mills himself; but when Anson Mills acquired his stock in this company, under what circumstances he acquired it, or what consideration, if any, he paid for it, this record is entirely silent; it may be said of him as of those whom he transferred his stock to, when he ''lost confidence'' in the mine and desired to avoid corporate liability, that there is no proof that he himself ever paid a penny for the stock that he was so liberal with under the conditions mentioned. In addition to this,

there is no proof in this record that the witness Overton was so related to Anson Mills at the time when Anson Mills acquired his stock, that he, the witness Overton, is able to speak, as of his own knowledge, of or concerning any consideration paid by Anson Mills for the stock that stood in his name. So far as this record instructs us, the witness Overton was not even acquainted with Anson Mills at the time when Anson Mills acquired the stock which stood in his name; and certainly there is no proof that the witness Overton personally participated in the transaction whereby any stock in the Presidio Mining Company was originally transferred into the name of Anson Mills. In point of fact, all that the witness Overton assumes to testify to in the place in question is a mere piece of hearsay gossip, not founded upon personal knowledge, and not dealing upon any fact or facts within the personal knowledge of the witness Overton. In a word, taking together all of the disclosures of the evidence upon this point, we decline to accept the statement contained in the appellee's brief "that General Mills' family, including Captain Overton, Colonel Carl A. Martin, the Kline family and Orndorff paid $60,000 cash for their stock".

The unmistakable conclusion from the record before this court must be, we venture to believe, that instead of this controversy representing any widely diffused protest on the part of the stockholders against the defendants, the litigation must be regarded as an effort upon the part of a single minority stockholder to "control the management", if he can, no answer being possible to the proposition that if the other stockholders, whether minority or majority, sympathized with the purposes of

this bill, they would have shown their sympathy in the practical form of intervention; and, as pointed out by Circuit Judge Sawyer,

> "It is always a suspicious circumstance where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim, *de minimis non curat lex,* very properly applicable."

Dannmeyer v. Coleman, 11 Fed. 97, 101.

SUPPORT OF APPELLEE BY STOCKHOLDERS:

Although at liberty to do so, yet not another stockholder, whether majority or minority, has intervened in this cause in sympathy with the purposes of this bill; and the inference that the other stockholders did not intervene because they were not justified in doing so, is not unreasonable.

In our opening brief, we have pointed out that though originally this suit was brought by "W. S. Overton and Carl A. Martin on behalf of themselves and other minority stockholders of the Presidio Mining Company, named in this complaint", yet, by the time the litigation reached the amended bill, all reference to any other stockholder than Overton and Martin had disappeared from the title of the cause; we further pointed out that not a single other stockholder intervened in the litigation as a co-complainant; and we directed attention to the views of the courts that the circumstance that no other stockholder has sought to intervene in the action justified an inference distinctly favorable to the defendants. Attempt is made in the appellee's brief, at page 78, to reply to these suggestions, but no claim is made that any other

stockholder, whether minority or majority, intervened as a co-complainant; and relying upon a statement contained in a pleading, which as a pleading had disappeared from the cause, it is stated, as an excuse, that the majority of the minority stockholders reside in distant states. Where, we ask, is the proof to be found in this record that "the majority of the minority stockholders reside in distant states"? The reference on page 78 of appellee's brief to page 2 of the transcript of record is a reference to seven persons; but on pages 31-2 of the transcript of record, and on page 38 of the transcript of record, will be found a list of the so-called minority stockholders of this company (see in this connection page 44, paragraph 10 of amended bill); this list, exhibit A, includes some 26 stockholders; what page of this record can this appellee put his finger upon as establishing that anyone of these 26 stockholders "reside in different states"? To sum up in a single sentence the entire situation in this regard, we challenge this appellee to identify a single page in this record which establishes that, Overton and Martin aside, a single other stockholder of the defendant company, at the time of the commencement of this litigation, or since, "reside in distant states". But, moreover, let us assume that these stockholders did "reside in distant states"; why should that circumstance impede them from intervening in this cause if they believed that this complainant had a legitimate ground for complaint, or that these defendants had done anything really detrimental to the interests of this company? In our discussion in our opening brief of the subject of laches we went into this question of residence in distant states; and we there pointed out

how transparent such a pretext was; and it will serve no useful purpose to repeat that discussion here.

It is in this connection, that the statement is made that "it appears from the record and the testimony that Captain Overton by reason of the support of the minority stockholders has been placed on the directorate of this company in spite of the most violent opposition of the appellants and their counsel"; and we hasten to characterize this, also, as a statement wholly unsupported by the proof contained in this record. No better refutation of this claim could be desired, we think, than the very pages themselves of the record to which reference is made in the effort to support this declaration; and since it must be assumed that this appellee has referred to the pages which most strongly favor the position taken by him, it must necessarily follow that if those pages fail to sustain his claim, the inquiry need not be prosecuted further. The first page cited to support this extraordinary statement is page 354; but upon that page, no word can be found to establish either the support of Overton by the minority stockholders, or his election to the directorate against the most violent opposition of the appellants and their counsel; at this place, the only suggestion of antagonism of any character was a statement, not that appellants and their counsel violently opposed the entrance of Overton into the directorate of the company, not that Mr. Ralph was violently antagonistic to the election of Overton as a director, but that *in the proceedings in the meetings,* Mr. Ralph was antagonistic to Overton. When we turn to the next page cited, viz., 377, we are constrained to dismiss the citation

with the single observation that no reference is made there in any form either to the support of Overton by minority stockholders, or to any opposition to his becoming a director by either the appellants or their counsel. At page 579, the next reference, not a syllable bearing upon this subject matter makes its appearance. Page 593, the next reference, deals with circumstances ensuing upon the opinion of counsel for the company relative to the change in the date of the holding of the annual meeting of the company; counsel advised the president of the company that the amendment to the by-laws altering the date of the annual meeting was in conflict with the provisions of the Civil Code of the State of California, an opinion which was well grounded and which has never been impeached; following this opinion, no meeting was held; and these are the circumstances referred to on pages 592 and 593 of the record. At that place, the solitary reference to the minority stockholders is contained in the following sentence from the testimony of the appellee himself, "we had a meeting of the minority stockholders, but a quorum was not present as prescribed by the by-laws". Whom he referred to by "we", no man can say; what minority stockholders he referred to, no man can say; whether the attitude of these minority stockholders was friendly or unfriendly to the appellee, no man can say; and while he states that he had in person or by proxy a trifle over 36,000 shares, yet, while we do know what his personal holdings were, we are not advised as to the character or limitations of the proxies referred to, or the number of minority stockholders represented by the alleged proxies. And certainly there is no proof here that in any prac-

tical sense he had the support of the minority stockholders, or that his entrance into the directorate of this company was effected "in spite of the most violent opposition of the appellants and their counsel". And finally, the last page cited in support of this declaration, is page 771 of the record; that page contains a portion of the testimony of Mr. Noyes on direct examination; it dealt with the acquisition of Section 5, and the basis upon which the $45,000 mentioned in the resolution of February 15, 1913, was arrived at; not one word can there be found touching, however remotely, upon any support of appellee by any minority stockholders; not one word can there be found touching, no matter how remotely, upon the entrance of this appellee into the directorate of this company in spite of the most violent opposition of appellants and their counsel. Such, then, is the assertion made in this brief; such, then, is the condition of the record upon which that assertion is uttered; and we submit that the mere contrast between the disclosures of the record upon the one side, and the extravagant assertion of the appellee in his brief on the other side, is the best possible answer that can be furnished to that extravagant assertion. In point of fact, this record fails to show how the appellee became a member of the board of directors of this company; and, for anything that this record shows to the contrary, he was elected to that post by the votes of the majority stockholders themselves. Nowhere throughout this record that we have been able to discover can there be found any proof of opposition either by appellants or their counsel, whether violent or otherwise.

MESSRS. PARCELLS AND RALPH, AND THE WILLIS ESTATE:

Before any person's rights of person or property can be invaded, due process of law requires that he shall be given adequate notice and a proper opportunity to appear and defend; no person should be adjudged guilty of participation in alleged fraudulent practices without having been accorded his day in court upon that question.

We have, in our opening brief, called attention at pages 34-36 to the manner in which Mr. Parcells, Mr. Ralph and Mrs. India Scott Willis, deceased, have been adjudged guilty of participation in fraudulent plans, although no one of them was a party to the action or ever had his day in court or any opportunity to defend upon any question in the cause which concerned him or his property. In this connection, we wish to remove any possible ambiguity which may lurk in the statement of our opening brief, page 35, that "Mr. Ralph never was a member of the board of directors"; we would not have this statement interpreted to mean that Mr. Ralph was never at any time a member of the board of directors, but only that during 1912, and subsequent years down to about January, 1917, he was not a member of the board of directors; in other words, while the history with which we are concerned in this cause was in the process of making, Mr. Ralph was not a member of the board of directors of this company, and did not become such until approximately one year prior to January 5, 1918 (see this fact stated in affidavit of appellee on page 354 of the record).

In reply to our complaint that Mr. Parcells, Mr. Ralph and the estate of India Scott Willis, should not have been adjudged participants in a fraudulent scheme with-

out having been accorded an opportunity to hear and defend, the statement is made, on page 91 of appellee's brief, that Mr. Parcells and Mr. Ralph had a full opportunity to present their side of the case upon the hearing of an order to show cause why an injunction should not issue restraining the transfer of certain shares of stock of the defendant company; it nowhere appears that this order to show cause was ever served upon either Mr. Parcells or Mr. Ralph, or that either of them participated in the hearing thereon, or that the injunction *pendente lite,* which ensued, was addressed to them or to either of them (see record pages 291-300). It does appear, on pages 300 and 301, that after the injunction *pendente lite* was issued, it was served by the Marshal upon Mr. Parcells; but it nowhere appears that any such service was made upon Mr. Ralph. We submit, therefore, that nothing here disclosed can possibly be regarded as justifying the finding and decree of the learned Judge below convicting Mr. Parcells, Mr. Ralph and Mrs. India Scott Willis of participation in any fraudulent scheme whatever; and that the attempted answer to our complaint on this score is no answer whatever. When, indeed, did any of these parties get what the appellee's brief on page 92 calls "a full and fair hearing"? Where is the evidence which implicates them as participants in any fraudulent plan or scheme? Why should these parties, against whom no evidence whatever was produced, have their good names tainted by a solemn decree of a court adjudging them guilty of fraud, made in an action to which they were not parties, in which they were never represented, and upon a record

barren of any incriminating circumstances whatever as against them?

RESULTING TRUST:

> **Notwithstanding belated denials by appellee, his original position was that, contemporaneous with, and as part of, the acquisition of Section 5, the Presidio Mining Company intentionally furnished the money with which the acquisition was made; the subsequent withdrawal from this position is in itself a confirmation of the financial inability of the company to make the purchase; and the change of front from the claim of resulting trust to that of constructive trust indicates a degree of uncertainty in the mind of appellee inconsistent with distinct definiteness of grievance.**

This subject matter is referred to at various places in the appellee's brief and, without doubt, one excerpt upon this subject matter will serve as a sample for the rest. Thus, on page 129 of appellee's brief, we find the following assertion made:

> "On the question of resulting trust; we never have asserted any resulting trust, neither has there been any change of front by complainants, as asserted on page 303 of said brief."

This subject-matter is fully discussed in our opening brief upon pages 303 and following, and it would serve no useful purpose to renew that discussion here. All that we can ask this court to do is to take the original, amended and supplemental bills, lay them side by side, and contrast the positions taken in them; if this be done, we have no fear as to the result. We desire, however, to call attention to the dogmatic denial contained in the passage just quoted from the appellee's brief; and if this court, from a comparison of the appellee's own pleadings, should reach the conclusion that he began

with a resulting trust, changed front, and ended with a claim of constructive trust, then we ask what type of argumentation is that which, in the face of such a situation as we have just referred to, can make the dogmatic assertion contained in the passage just quoted from? And if the court should determine that the passage just quoted from is at variance with the disclosures of the pleadings, then, since the subject matter is one upon which no mistake could well be made, the inquiry does not become impertinent as to the motive which led to the making of the statement so plainly and consciously at variance with the facts.

In this connection, we hope we may be pardoned a recurrence to the following passage to be found on page 198 of our opening brief:

> "Obviously, the position of Mr. Noyes at the time of that purchase, the situation of the company at that time, and the relations, such as they were, between him and the company, were not such that any duty, obligation or trust rested upon him, requiring him either to purchase Section 5 for the company, or to refrain from purchasing it for himself; not only was the Presidio Mining Company without 'the better right' to Section 5, but it had no 'right' of any character to the section (Stark v. Starrs, 6 Wall. 419; Meader v. Norton, 11 Id. 458); and after he did acquire the section, he did not operate it in independent opposition to, or competition with, the Presidio Mining Company."

We have searched in vain throughout the appellee's brief for any reply to the suggestions here made; and indeed, taking into consideration all of the circumstances of this case, we are not able to see what reply could be made. The essential ideas of this passage are contained in Section 2224 of the Civil Code of California, which

provides that one who obtains a thing by fraud, or the violation of the trust or other wrongful act, is

> "unless *he* has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person *who would otherwise have had it;*"

and in the application of the principle involved in this section, the courts attach importance to the expression "the person who would otherwise have had it". Thus, for example, in *Plummer v. Brown,* 70 Cal. 544, it is held that in an action by the unsuccessful claimant to compel a conveyance of the legal title, the claimant must allege and clearly prove that he occupies such a status as gives him the right to control the legal title; and in this connection, the case of *Stark v. Starrs* above cited is referred to as a commanding authority. So, also, in *Buckley v. Howe,* 86 Cal. 596, *Plummer v. Brown* is approved, the court holding that

> "plaintiff must also show that she herself occupies such a status towards the property as entitles her to control the legal title".

And likewise in *Crosby v. Clark,* 132 Cal. 1, the same principle is applied, the court quoting Section 2224 above referred to. In *Stark v. Starrs,* 73 U. S. (6 Wall.), 402, the Supreme Court took the ground that

> "the plaintiff must first show in himself some right, legal or equitable in the premises, before he can call in question the validity of the title of the defendant";

and then, after referring to certain authorities, further observes,

> "these are only applications of the well established doctrine that where one party has acquired the legal title to property *to which another has the better right,* a

> court of equity will convert him into a trustee of the true owner and compel him to convey the legal title".

Likewise in *Meader v. Norton,* 78 U. S. (11 Wall.) 442, this passage from *Stark v. Starrs* is referred to with approval; and in *Johnson v. Towsley,* 80 U. S. (13 Wall.) the doctrine of *Stark v. Starrs* is again approved. In other words, as we observed in the passage above quoted from our opening brief, not only was the Presidio Mining Company without "the better right" to Section 5, but it had "no right of any character to that section"; and it was not in the category of persons referred to in Section 2224 of the Civil Code as those "who would otherwise have had" Section 5. And all of this was particularly true because in the relations between Mr. Noyes and the Presidio Mining Company there was none of that peculiar "confidence" which is so much dealt with by courts of equity:

> "here, there was no trust or confidence other than that which is manifested in all business affairs in which the honor or ability of the party is relied upon for performance".
>
> *Taylor v. Kelley,* 103 Cal. 178, 183.

THE OSBORN STOCK:

The transfer of stock from Osborn to Noyes was quite as valid as the transfer of stock from Mills to Overton; no extortion by Noyes has been exhibited, or existed; and in making the transfer, Osborn executed the desire of his donor that Mr. Noyes should share.

Our views concerning the Osborn stock episode, are fully stated in our opening brief. That subject matter is referred to likewise by the appellee; but here again we encounter that confusion of thought so characteristic of the appellee's brief. From first to last, no attempt

is made to reason out the facts connected with Boyd's transfer to Osborn and Osborn's transfer to Noyes; and while here and there, in one form or another, the claim is repeated that Mr. Noyes extorted this stock from Osborn, yet the brief is singularly deficient in its references to specific facts even remotely tending to support that accusation. Nor is there anything contained in the allegations set forth on pages 151-2 which in any way qualifies the position taken by Mr. Noyes relative to this stock. In his testimony, Mr. Noyes plainly stated that Osborn had been holding this stock as trustee for him (Noyes) since 1907; and that in December, 1912, when Mr. Noyes renewed his effort to establish the cyanide plant, and rather than see the company disintegrate, determined to install that plant by his own unaided efforts, he told Osborn that if any responsibility were to be assumed, he was prepared to assume his share thereof, and requested Osborn to make the formal transfer upon the books, which was done. There is nothing, we submit, in the allegations quoted in the appellee's brief which in the remotest degree impeaches this testimony; those allegations are nothing more than allegations of the mere fact of the transfer; and there is nothing contained therein, or in the testimony of Mr. Noyes, inconsistent with the proposition that on December 12, 1912, Mr. Osborn was the principal stockholder of the corporation,—indeed, he would be that though all of his stock were held in trust.

It may, we think, here be added that during our discussion of this Osborn stock episode contained in our opening brief, we directed attention to the two letters

of December 14th and December 25, 1907, written by Osborn in California, to Mr. Noyes in Texas, at a time when Mr. Noyes had no knowledge of the purposes of Mr. Boyd with reference to his stock; and we pointed out that the first information that Mr. Noyes received concerning that subject matter, he received from Osborn himself; we submitted that state of facts as bearing upon the gross improbability, not to say impossibility, that Mr. Noyes had extorted this stock from Osborn, and we find nothing in appellee's brief at all calculated to disturb the views which we have expressed in this connection.

THE OSBORN SHORTAGE:

No proof was made that, on or prior to December 12, 1912, Mr. Noyes was aware of this shortage, or that it was utilized by him to extort stock from Osborn, or that it was "concealed" by Mr. Noyes.

This subject matter is very fully discussed in our opening brief. That the shortage occurred seems to be nowhere disputed; that Mr. Noyes loaned Osborn the money with which to make good that shortage, cannot be contested; but stress is still put by the appellee, in his brief, upon the claim that Mr. Noyes discovered this shortage prior to December 12, 1912, and used it as an instrument to compel Osborn to transfer to him one-half of the stock which Osborn had been given by Boyd; and incidental to this claim, it is urged that Mr. Noyes "concealed" the Osborn shortage. But the testimony of Mr. Noyes, not only uncontradicted, but also corroborated, is directly to the fact that he did not discover the Osborn shortage until, in connection with the establishment of the new cyanide plant, he had occasion to

inquire into the available cash of the company; this inquiry led to the discovery of the shortage on the 19th or 20th of January, 1913; and immediately upon this discovery, Mr. Noyes wrote to Mrs. Willis the letter of January 23, 1913, which appears in the record. Until conditions at the mine rendered the pan-amalgamation method obsolete, and demanded its supersession by the establishment of the cyanide plant, Mr. Noyes had no occasion to make inquiries into the available cash resources of this company; as we pointed out in our opening brief, his activities were centered upon the actual mining operations; and there was no more reason why he, rather than, for example, Gardiner or Herger, should have known of this shortage prior to the time when circumstances forced it on his attention.

And in passing, it may be observed that, although Gardiner and Herger were continuously in San Francisco, and had their office in the same building with Osborn—had their office so close that they were called to directors' meetings by a knock of Boyd's stick upon the floor—although they were not away in Texas concerned with actual mining operations, and although they were directors of this company from 1907 to 1913, yet neither of them ever knew of the existence of this shortage; nor is there any proof in this record that any other officer, director or stockholder of this company had any knowledge of the shortage prior to January, 1913; and yet, if you please, Mr. William S. Noyes is to be charged with knowing something which no one else knew anything whatever about. This is, indeed, but another instance of the attempt to claim

fraud by the most improbable contentions, by disregarding natural deductions and probabilities, and by presuming men to be dishonest instead of honest—and that, too, not only without evidence to justify the claim, but in the very face of the actual evidence itself. To claim belief at once in a theory and also in a fact which contradicts it is a form of credo unrecognized by moderate and reasonable men; but to believe in a theory because a fact contradicts it is a mental distortion valuable only as it illustrates the illimitation of human dotage.

And Osborn's motive for secrecy is, as it must be, fully conceded even by this appellee, for, on page 157, we find it conceded that "Osborn was fearful of a disclosure of his crime"; and since this was Osborn's state of mind, it is absurd to believe that he would have said or done anything which would have brought about the discovery of that which he was so anxious to conceal.

On page 156 of the appellee's brief, it is plainly stated that "Noyes would not have countenanced Osborn, known by him to have been short in his accounts before (539), to have run the company with four dummy directors"; but if, upon the one hand, "Osborn was fearful of a disclosure of his crime", and if, upon the other hand, "Noyes would not have countenanced Osborn, known by him to have been short in his accounts before (539), to have run the company with four dummy directors", upon what principle is Noyes to be charged with knowing, prior to December 12, 1912, a condition unknown to any other person interested in this com-

pany? If the one party were concealing his dereliction, and if the other party would not have countenanced him in the running of the company if he had known of this dereliction, according to what logic, then, is the latter to be charged with knowledge of a dereliction concealed from all concerned?

It is in this connection that repeated reference is made to the testimony of Kniffin. It is indispensable to the appellee's contention that Mr. Noyes should have known of this Osborn shortage prior to December 12, 1912, since that knowledge was the instrumentality, according to the contention of appellee, through which he brought about the transfer from Osborn to himself on that day of one-half of the Boyd stock; and therefore, any evidence which fails to establish that, prior to December 12, 1912, Mr. Noyes knew of this Osborn shortage, can not be of the slightest judicial consequence; for, obviously, if Mr. Noyes did not learn of the Osborn shortage until after Osborn had already transferred to him the one-half of the Boyd stock, then, plainly, such knowledge could not have been instrumental in bringing about that transfer.

Notwithstanding all this, however, Kniffin's testimony is characterized as clear and reliable, "both as to time, place and occurrences" (appellee's brief, page 85), and "clear and convincing" (appellee's brief, page 188). We are, however, constrained to dissent from this characterization of Kniffin's testimony, and to refer to our analysis of that testimony as contained in our opening brief. No answer, indeed has been made, or can be made, to the outstanding fact that Kniffin was

absolutely unable to testify that at any time during the month of December, 1912, and, in particular, prior to December 12, 1912, Mr. Noyes had any knowledge whatever of or concerning the Osborn shortage; and as we have already pointed out, knowledge acquired for the first time subsequent to the date of the transfer of the Osborn stock to Mr. Noyes could not possibly have influenced that transfer.

At page 7 of the appellee's brief, the declaration is made that Kniffin arrived December 24, 1912; but the fact is—and here again we encounter that reprehensible looseness about dates when dates are of importance to the ascertainment of the real truth of the transaction—that Kniffin testified,

> "I went first to Shafter in connection with this matter in the year 1910, I think it was. I went there again on or about December 23, 1912, in connection with the installation of this plant. Mr. William S. Noyes and Mr. E. M. Gleim met me at the station" (984).

There is no proof whatever that between 1910, when Kniffin first went to Shafter "in connection with this matter" and December 23, 1912, when he went again and met Mr. Noyes at the station, Kniffin had met Mr. Noyes or had had any conversation or other communication, oral or written, with him; and so far as the record before us discloses, "on or about December 23, 1912" was the first opportunity, subsequent to December 12, 1912, which presented itself when Mr. Noyes could have made any statement to Kniffin indicating prior knowledge upon his part of any shortage by Osborn. There is no claim anywhere in this

record that on that occasion Mr. Noyes made to Kniffin any such statement as this, for example,

> "Kniffin, during the early days of this month, I discovered that Osborn was short between ten and eleven thousand dollars in his accounts";

nor is there the slightest pretense that at any time or place Mr. Noyes ever made to Kniffin any statement of any kind upon that subject; and our views concerning Kniffin's testimony in so far as it attempts to touch upon either Mr. Gleim or Mr. Burcham, have already been fully developed in the opening brief.

At page 85 of the appellee's brief, the question is asked,

> "If Kniffin's testimony and statements that he had been informed of the Osborn shortage in the early part of January, by Gleim, had been untrue, why did not defendants have Gleim contradict the statements made?"

But we reply to this inquiry by making another, namely, since Kniffin's testimony was grossly uncertain, vague and indefinite as to points of time, since no foundation was laid whereby Mr. Noyes could be bound by any declaration of Mr. Burcham or Mr. Gleim as to the condition of the treasury of the company, since Kniffin himself was uncertain as to whether the statement in connection with the shortage was made by Gleim or Burcham, and since Kniffin's testimony fixed January 13, 1913, as the date of the statement by Gleim or Burcham, whoever it was—over a month after the transfer of the stock by Osborn to Noyes had been fully consummated—what occasion was there for contradicting testimony which broke with its own weight? To put a witness upon the stand

to contradict testimony which establishes nothing is to beat the air; and Kniffin's testimony nowhere shows, directly or indirectly, proximately or remotely, that prior to the transfer by Osborn to Noyes of the one-half of the Boyd stock, Noyes had then any information of or concerning any shortage by Osborn. At first, Kniffin was uncertain as to whether it was Gleim or Burcham who referred to the shortage; at the top of page 949, he says:

> "I was informed of the Osborn shortage sometime in the early part of January; I was told by either Mr. E. M. Gleim or Mr. William D. Burcham";

and significantly enough, this indecision and uncertainty of the witness was sought to be corrected in the question immediately following which eliminated Burcham and limited the identity of the informer to Gleim, a limitation which thereafter, having received his cue, Kniffin adhered to. He follows this up by stating that

> "Mr. Gleim told me that money they thought they had had been taken from the treasury and they did not have it",

but he makes no attempt whatever to establish when it was that Gleim learned this interesting fact; and his testimony is entirely consistent with the theory that Gleim learned that fact on the very day when, according to Kniffin, Gleim communicated the information to Kniffin. In a word, and without pursuing this analysis further, the attempt to fasten upon Mr. Noyes knowledge of the Osborn shortage on or before the transfer of the stock in question was so complete, unmistakable and manifest a failure that no experienced

counsel would have wasted his time or the court's in seeking to contradict it—we do not contradict that which proves nothing as to the matter in hand.

On page 132 of appellee's brief, the statement is made that

> "Kniffin testified he was informed by Gleim the early part of January that Osborn was short in his accounts, and to hold off on the cyanide installation until financial matters were re-adjusted" (949).

But what Kniffin testified to at page 949 was this:

> "I was informed of the Osborn shortage sometime in the early part of January; I was told by either Mr. E. M. Gleim or Mr. William D. Burcham";

he was then asked to fix the time "as near as you possibly can", and he went on to explain "as near as he possibly could", and he said,

> "It was the early part of January. I returned to Shafter about January 3rd and did some other detail work on the design of the mill. I was then ready to proceed with the construction, and Mr. Gleim told me that the money they thought they had had been taken from the treasury and they did not have it. Then, finally, on the 19th day of January, he gave me orders to start the work. I started the work on the 20th."

Plainly, this testimony leaves exceedingly indefinite the vague phrase "the early part of January"; and no attempt is made by the witness to fix any particular date between January 3rd, when he returned to Shafter, and January 19th, when Gleim gave him orders to start the work. But upon cross-examination, we learned that during this interval something was said. On cross-examination, he tells us that he arrived

> "about the third of the month, and it was some time after the third that he (Gleim) told me; when he told me, I had been there some little time; I do not know exactly how long—I could not say; it might have been ten days; I think it would be about ten days. I should say he told me that on or about the 13th of January" (957-8);

but if Gleim told him on or about the 13th of January, 1913, the question still recurs, even upon Kniffin's story, assuming that any reliance can be put upon his memory as to dates, as to when Gleim himself learned the fact which he communicated to Kniffin; and Kniffin's testimony is entirely consistent with the fact that Gleim never learned of any shortage until the very day when he communicated that fact to Kniffin.

We fail to grasp just what is meant by the statement on page 188 of appellee's brief, that

> "the testimony of Overton shows that Kniffin was the man who communicated the fact of the Osborn shortage to him (616). It is also clear from Kniffin's testimony that William S. Noyes was at the plant during all this period, which is corroborated by the other testimony in the case."

But while no one has ever disputed Mr. Noyes' presence at the mine during January, 1913, where is the proof that at this period Kniffin was acquainted with the appellee or his address, so that he might communicate to the appellee the fact of the Osborn shortage? Is this another of those statements, so frequent in this brief, which cannot be accepted as reliable? We submit that there is no proof whatever in this record that during January, 1913, Kniffin knew that any such individual as this appellee was in existence; and whatever and however extravagant may be the implications of the above

quoted passage from the appellee's brief, the actual testimony gives no countenance whatever to them.

We know from the testimony of the appellee that in 1915 he came to San Francisco, not to inquire into the affairs of a company in which the donor of his stock had "lost confidence" and for which he and his family had so little regard that they had forgotten what stock stood therein in their names, but to visit the Exposition then in progress; while in San Francisco, he met Mr. Noyes; upon leaving San Francisco he went East by way of the mine, and thereafter he returned to San Francisco, and "I got here on the 6th of July, 1915" (583, *ad finem*). In other words, this record shows that "I came to San Francisco to visit the Exposition, in March of 1915" (580), and "I came back to San Francisco in July. I got here on the 6th of July, 1915" (583). Between the time when he paid his visit to the mine on his return to the East and the time when he returned to San Francisco, "before I came to San Francisco, I made an investigation in Texas" (616); but up to this time, he had had no communication whatever with Kniffin. After referring to the investigation which he made in Texas before he returned to San Francisco, the appellee goes on to say,

> "then, later, I got word from Mr. John W. Kniffin who told me—that is what you want. I got a telegram from Mr. John W. Kniffin that Osborn had been $27,000 short in his accounts, and that Mr. E. M. Gleim had told him so."

Evidently, during this investigation which took place in Texas prior to Overton's return to San Francisco, he had met Kniffin, or at all events he and Kniffin be-

came acquainted with the circumstance of each other's existence, and Kniffin acquired Overton's address. But the telegram which Kniffin sent to Overton and which the language used in appellee's brief at page 188 would suggest was sent during January, 1913, while Mr. Noyes was at the plant "during all this period", sheds additional light upon the inherent and ineradicable unreliability of any statement emanating from Kniffin.

When Kniffin was testifying as a witness, he made no claim that Gleim or Burcham fixed the amount of the Osborn shortage; but, if we are to take the statements of the appellee at their face value, Kniffin telegraphed the appellee

> "that Osborn had been $27,000 short in his accounts, and that Mr. E. M. Gleim had told him so" (616).

From what we know concerning the Osborn shortage, it is entirely manifest that Gleim could not have told to Kniffin any such extraordinary tale as that Osborn was $27,000 short in his accounts; no such shortage as that has ever been suggested by any reliable evidence in this cause; Gleim or Burcham, whichever it was, never specified to Kniffin any shortage of $27,000, or any other particular amount; and the whole incident is another item of evidence impeaching the reliability of Kniffin.

That Mr. Noyes actually knew of the Osborn shortage prior to, and at the date of, the transfer to him of one-half of the Boyd stock, namely, December 12, 1912, was a fact vital to the complainant's theory of fraud, as recognized on page 205 of the appellee's brief, "for complainants have stoutly maintained in the fed-

eral court that Noyes knew of the Osborn shortages before January 19, 1913". But it is, of course, obvious that the mere fact, assuming argumentatively such to be the fact, that Mr. Noyes "knew of the Osborn shortages before January 19, 1913," would be wholly without significance as establishing any fraud, unless it also appear that he knew of the shortage on or before December 12, 1912, when he acquired from Osborn one-half of the Boyd stock. Since it is established in this cause by the appellee himself (505-6) that Osborn transferred one-half of the Boyd stock to Mr. Noyes on December 12, 1912, and since accepting Kniffin's testimony for the purposes of this illustration, Mr. Noyes learned of the Osborn shortage on January 13, 1913, it becomes highly interesting to know how Mr. Noyes, in order to extort from Osborn one-half of the Boyd stock, could utilize facts which did not come to his knowledge until over one month after the transfer of the one-half of the Boyd stock had become an accomplished and completed fact. The mere circumstance, therefore, if it be a circumstance, that Mr. Noyes knew of the Osborn shortage before January 19, 1913, is entirely inefficient to assist the appellee's theory of fraud, unless the proof goes farther and shows that at the time of the acquisition of the stock in question Mr. Noyes then knew of the shortage, so that he might have employed that knowledge as the instrumentality through which to wrest the stock in question from Osborn.

On this same page, 205, it is stated that

> "the witness Kniffin testified he (Mr. Noyes) knew before this date (January 19, 1913) that Gleim had informed him (Kniffin)."

But as to these statements, we wish to enter our protest. The testimony of the witness Kniffin may be microscopically examined from end to end without finding therein any testimony by Kniffin to the effect that Mr. Noyes knew of the Osborn shortage before January 19, 1913; all that Kniffin pretended to swear to on direct examination was that Gleim told him "that money they thought they had had been taken from the treasury, and they did not have it",—a statement which, on cross-examination, he altered to the following form:

> "He (Gleim) had previously told me, sometime toward the first of the month, that there would have to be a suspension of some kind because they did not have any money" (949, 957).

Nowhere is there any evidence which we are able to discover, given by Kniffin to the effect that Mr. Noyes knew of this shortage before January 19th; there is not a syllable of evidence to show that there was any conversation or other communication between Kniffin and Noyes upon that topic, and just how Kniffin could assume to know the state of Mr. Noyes' mind upon this subject without some direct communication from him, we are unable to understand. The statement in this brief at this place that "the witness Kniffin testified he (Mr. Noyes) knew before this date (January 19, 1913)" is another of those statements which are so plentiful in this brief, upon which no reliance can be placed,—the witness Kniffin testified to nothing of this kind. And so far as the phrase "that Gleim had informed him", on page 205 of appellee's brief, is concerned, if that phrase is to be interpreted as carrying the impression that Mr. Gleim informed the witness Kniffin that Mr.

Noyes knew of the Osborn shortage before January 19, 1913, such interpretation would be grossly misleading and wholly irreconcilable with anything which Kniffin has sworn to. Kniffin has told us of statements which he attributes to Mr. Gleim; and taking those statements at their face value, there is not a word in them to show that Mr. Gleim told Mr. Kniffin that Mr. Noyes knew of the Osborn shortage before January 19, 1913.

At the same place, page 205 of appellee's brief, reference is made to the Willis letter of January 23, 1913, and from that letter the statement is quoted that "this is the second and more serious instance of this in the history of the company". When Mr. Noyes used this language, he had been speaking about Osborn; but while he states that this is the second and more serious instance in the history of the company, yet he does not state that this is the second and more serious instance in the history of the company in which Osborn was a participant. We believe, from our recollection of the record before us, that the passage here quoted is the first, last and only reference to any other "instance of this in the history of the company", and that there is no evidence anywhere in the record to show when the other instance occurred, or how it occurred, or what were its circumstances, or who participated in it; and therefore, to assume, as this appellee does, that Osborn was a participant in that prior instance is to assume a fact wholly unsupported by any evidence in the record. In this quotation from the Willis letter, there is not the remotest intimation that Osborn participated in this prior instance, or that Mr. Noyes

knew or believed that he did so; certainly, Mr. Noyes does not say so; and there is nothing in the record, as we have just observed, to indicate that such a statement would be justified. And yet, when we turn to page 156 of the appellee's brief, we find the statement actually made that Osborn was "known by him (Mr. Noyes) to have been short in his accounts before", and a reference in professed support of this statement is made to the very Willis letter which we are now considering. By what authority this last statement of the appellee is justified, we know not. Certainly no search of ours through the record indicates in any way whatever that Mr. Osborn participated in any manner or form in the prior instance referred to by Mr. Noyes in this letter, or that Mr. Noyes knew or believed him to have done so.

Something is said in the appellee's brief, commencing at page 196, concerning an item of $3500 as an additional peculation by Osborn; but this item does not seem to us to be of any special significance in the case, either as to the acquisition by Mr. Noyes of the one-half of the Boyd stock in December, 1912, or as to the purchase of Section 5. The position of the appellants, both below and here, is that on December 12, 1912, when the half of the Boyd stock was transferred by Osborn to Mr. Noyes, Mr. Noyes then had no knowledge of any shortage whatever by Osborn, whether great or small, or whether it included this $3500 item or any other item; that he did not learn of the Osborn shortage until the 19th or 20th of January, 1913, and that the Osborn shortage, as he then learned of it, aggregated

$10,689.75; and in view of these considerations, we fail to perceive the relevancy or importance of this $3500 item so far as any issue of fraud in this case is concerned. And obviously, the existence of this particular item, or Mr. Noyes' knowledge or ignorance thereof, was without the slightest influence in the matter of his purchase of Section 5; the item never entered into that transaction, and exercised no influence over it. If, by credible and satisfactory evidence, it were established that this $3500 item, along with the other items composing the Osborn shortage, were known to Mr. Noyes prior to December 12, 1912, and that such knowledge exercised influence over the transactions in question here, one might be disposed to give consideration to this particular item, otherwise, it does not appear to be of material importance.

CONTINUANCE OF OSBORN IN EMPLOY OF COMPANY:

There was neither fraud, nor detriment to the company, in retaining Osborn for a time, especially since his relations with the company funds abruptly terminated upon the discovery of his shortage.

The remark is made on page 163 of appellee's brief that "Noyes allowed Osborn to continue as director and secretary at $300.00 per month". But could a statement well be more partial or one-sided than this? In the interests of fairness, why should not all of the surrounding circumstances be stated so that the court might see this alleged circumstance in its true setting? We know that when the occasion arose in connection with the establishment of the new cyanide plant for exact information concerning the company's finances, Mr. Noyes, then in Texas, learned that Osborn was short in his

accounts. He then wrote to Mrs. Willis the letter of January 23, 1913, in which he puts an accent upon the proposition that "the company's funds are to be handled safely", in which he refers to his moral obligations to protect his friends if the company borrows money from them, in which he expresses his anxiety that "cash cannot be taken from the treasury unknown to the president", and in which, after referring to Osborn, he goes on to say, "he can keep the books but ought not to handle the cash" (537-9). We know also that following upon the discovery of the Osborn shortage, there was, so to speak, a reorganization of the company, and that in the course of this, Mrs. Willis' sympathies were strongly enlisted in behalf of Osborn's wife and children, sympathies which found a ready response in the good business policy of avoiding the disclosure of Osborn's fault during the then financial enfeeblement of the company. The result of all this was, as we have pointed out in our opening brief, that while Osborn was permitted to perform the duties as secretary, his control over the cash abruptly terminated; and from that time until he severed his connection with the company he was deprived of control over the funds. As we pointed out in our opening brief, it is not, we believe, of judicial consequence, whether the retention of Osborn for a time, purely as secretary, was or was not judicious, nor are we confronted by any evidence to show what this company would have gained if this unfortunate man's reputation were blasted and his family's prospects ruined, nor is it even necessary to speculate upon the effect upon this company's welfare of a public disclosure

of this depletion of its treasury; but the real question is whether this retention of Osborn, for a time, as secretary, was in itself an act of fraud or operated any real detriment to this corporation; and to this inquiry we submit that there can be but one reply. Certainly the retention for a time of Osborn as secretary of this company operated no influence upon the transfer of the Boyd stock on December 12, 1912, previously; nor did this fact have the slightest relation to the acquisition by Mr. Noyes of Section 5. And since this circumstance was productive of no detriment to the corporation that this record has disclosed, we fail to see how this fact can be tortured into a cause for complaint on the part of this particular appellee. As pointed out in our opening brief, no claim is made that Osborn was not a competent secretary. He understood thoroughly, and so far as we know faithfully performed, all of his duties in that regard; and while, out of all the stockholders in this company, whether minority or majority, the present appellee is the sole individual to complain that Osborn was not so free with information as he might have been, still, that same attitude could well have been, and as reports of decided cases show, frequently has been the attitude of secretaries of corporations who have never abstracted one penny of their corporate funds—in other words, no relation exists between the retention of Osborn for a time as secretary of this company and his general conduct as secretary simply, which can successfully transmute his retention into an act of fraud. Nor can any inference be fairly drawn from the passage above quoted from page 163 of appellee's brief, that Mr. Noyes allowed Osborn to

continue as secretary. The retention of Osborn was an act of the directorate, and, as the record shows, not long thereafter he severed his connection with the corporation.

MRS. WILLIS:

> **The insinuation that Mrs. Willis was an aged woman who became "an easy prey to these two brothers", is equally as ill-founded and untruthful as the claim that Mr. Noyes knew of the Osborn shortage on or before December 12, 1912, or the claim that Mr. Noyes ever was the "confidential agent" of the Presidio Mining Company for the acquisition of Section 5.**

There are some statements contained in the appellee's brief relative to this lady which, to express the thought mildly, have excited our surprise. She is referred to in more than one place, but the principal reference will be found at page 109 of appellee's brief; and it is with reference to the statements there contained, which are characteristic of other statements elsewhere scattered through this brief, that our surprise has been excited. For example, it is stated that she was an "aged widow", and this statement seems to have been made for the purpose of lending probability to subsequent accusations against Mr. Noyes and his brother. We cannot know, of course, what the appellee's conception of an aged widow may be; it is possible that he considers a lady of between 40 and 50 years to be an aged person; but in this conception we cannot concur. That Mrs. Willis was a widow, there can be no question; but that she was an aged widow, in the sense sought to be implied by page 109 of the appellee's brief, we flatly deny. Not only is there no evidence in this record definitely fixing this lady's age, but there are circumstances which

suggest the inference that she could not well have been much over fifty years of age, if that old. For example, Miss Doherty, testifying during the early part of 1916, tells us that Mrs. Willis had been a widow for 26 years; and since, in the absence of evidence, one conjecture is as good as another, there is nothing in this record to prohibit the thought that she was married at 20 years and that her husband died when she was 24 years old, which would leave her 50 years at the time of her death, in 1914 (317). And at all events, no witness in this record with whose name we are acquainted anywhere attempts to describe Mrs. Willis an as an aged widow; even her most intimate companion, Miss Doherty, describes her in no such manner; and the suggestion that she was an aged widow, is, like so many other suggestions in this brief, quite without substantial or any evidence to support it. But, properly read, page 109 of appellee's brief is not intended to convey the suggestion that Mrs. Willis was an "aged widow" merely, but the implication is that she was an aged widow of a special class, to wit: one who could be played upon by a shock, bewilderment, sympathy, prospective loss, confidence or persuasion,— a phase of the situation which is entirely without support in the record before us. Indeed, so far does the appellee go in this direction that he actually claims that "she was an easy prey to these two brothers", referring to Mr. Noyes and his brother. And in this connection it is asserted that "she did not consult independent disinterested friends or counsel (689-693). Surprise and sudden action were the chief ingredients in her course of conduct. Due deliberation was wanting". We submit that these flights of fancy are entirely without and be-

yond anything disclosed in the present record. There is no proof here of any shock or bewilderment, sympathy, prospective loss, confidence or persuasion in the sinister sense intended by this page of the appellee's brief; and while, in the letter of January 23, 1913, forwarded from Texas to Mrs. Willis, Mr. Noyes made suggestions intended for the betterment of this company, we think he would have been rather a poor sort if his training and experience did not naturally invest his views upon these matters with a reasonable amount of fair importance, when addressed to one who, like himself, was interested in the subject matter. But that there was either in this letter or in his subsequent conversations with her as detailed in this record any sinister or improper influence, this record completely repudiates.

It is said that "she did not consult independent disinterested friends or counsel", and pages 689 and 693 of the record are cited to show that she did not hold such consultation. But, when we turn to page 689 of the record in our search for evidence that she did not consult independent disinterested friends or counsel, we find ourselves doomed to disappointment, for nothing at that place in the record supports or tends to support the assertion made in appellee's brief; and when we turn to page 693, our inquiry meets the same fate. We venture the assertion that no page of this record can be specified by this appellee which sustains the assertion that Mrs. Willis did not consult independent disinterested friends or counsel; and there is nothing in this record inconsistent in any way with such action upon her part. In this connection it is stated that

"surprise and sudden action were the chief ingredients in her course of action, due deliberation was wanting"; and this assertion is as barren of support from the record as the assertion last referred to. No claim is made, or could be made, that Mrs. Willis, at the times mentioned, was anything but an intelligent woman; there is nothing in the disclosures of this record which impeaches her mentality in any way; and for many years prior to 1913, she had been more or less familiar, as this record indicates, with the general trend of affairs in the Presidio Mining Company; but, on January 23rd, Mr. Noyes had written her, from Texas, the letter which appears in the record, and, assuming that it would require four days for that letter to come from El Paso to San Francisco—a liberal estimate—she would have received it on January 27th. But Mr. Noyes did not arrive in San Francisco until "about the 5th or 10th of February" (689). If he arrived upon the 5th, then Mrs. Willis had nine days within which to consider his letter, and if he arrived upon the 10th, she had 14 days within which to consider that letter, and to consult "independent disinterested friends or counsel", if she desired to do so; and there is nothing in this record to show that she did not—she had ample time to do this. But, in the meantime, and prior to the arrival of Mr. Noyes from Texas, his brother, Mr. B. S. Noyes, had called on Mrs. Willis upon one occasion, and so stated in his direct examination at page 906. This prior visit was made upon the 22nd or 23rd of January, and on that occasion Mr. B. S. Noyes told Mrs. Willis what he had discovered as to the Osborn shortage and "asked what we should do about it" (906); and when Miss

Doherty was questioned concerning this same visit, she corroborated Mr. B. S. Noyes and testified that the one matter discussed upon the occasion of that interview was the recent discovery of the Osborn shortage (811). In other words, so far as this interview was concerned, neither surprise (except the natural surprise consequent upon the discovery of the Osborn shortage), nor sudden action, nor the absence of due deliberation, can be said to have been established. All that occurred was that Mr. B. S. Noyes, having just learned of the Osborn shortage, called upon Mrs. Willis, stated that fact to her, "and asked what we should do about it". There was no oppression of this lady, no crowding of her into a hurried and undeliberate course of conduct, no persuasion, no pressure, no advantage taken of any shock or any bewilderment; and instead of suggestions being then made by Mr. B. S. Noyes to her, he looked to her for suggestions, "and asked what we should do about it". Thereafter Mr. B. S. Noyes received a carbon copy of the letter dated January 23, 1913, from Mr. William S. Noyes to Mrs. Willis; and upon the receipt of this letter he called upon this lady again, and they had some further discussion concerning the Osborn shortage, and how the company was going to pull over the rough places; and at this second interview, Mrs. Willis, who had then received the letter of January 23rd, expressed her willingness, in accord with the suggestion contained in that letter, that Mr. B. S. Noyes should take the presidency of the company; and that was the length and breadth of this second interview, as explained by Mr. B. S. Noyes; and here, also, Mr. B. S. Noyes is corroborated by the testimony of Miss Doh-

erty, to the extent that Mrs. Willis was agreeable to the suggestion that Mr. B. S. Noyes should be elected president of the company, although Miss Doherty is unable to remember whether that willingness was expressed in a conversation or not (812). In all this, which is established by uncontradicted evidence, there is no trace of any surprise or sudden action: immediately upon the discovery of the Osborn shortage Mrs. Willis was advised of that unpleasant fact, and immediately upon the receipt of the carbon copy of the letter of January 23, 1913, this shortage was again discussed, and as a measure of precaution against a similar occurrence, the suggestion that Mr. B. S. Noyes should become president of the company was willingly agreed to by Mrs. Willis; what is there in all this to justify the implications sought to be insinuated by page 109 of the appellee's brief? We respectfully submit that a charge of fraud is not to be established by straining facts out of their real identity, or by disregarding natural situations, or by persistently presuming a man to be dishonest instead of honest; and we submit that it is impossible to find in the history of the relations between any of these defendants and Mrs. Willis any trace whatever of fraud, conspiracy, or wrongdoing upon the part of anyone. Finally, about February 5th or 10th, 1913, Mr. William S. Noyes arrived in San Francisco and had conferences with Mrs. Willis concerning the unfortunate situation which had overtaken this company. He tells us that:

> "After my return here to San Francisco, I went to see Mrs. Willis, and Miss Doherty at Mrs. Willis' apartments, and told her there was this shortage, and it left me in a

bad scrape, and the company in a worse one; that I had bought this Section 5 with money that I had borrowed; the company had these contracts which I had assured my friends were good; and the company could have that mine at cost if they wanted it. The mine that I refer to was Section 5. Mrs. Willis, of course, was very much perturbed over this occurrence. She said she did not see how they could take it. Miss Doherty felt the same way. * * * I had several conferences with both these ladies and one with Mr. Osborn. I told them that there was ore in there we could pull the company out with, notwithstanding the bad situation. We had all of these obligations that were assumed or agreed to be assumed, and it was too late to back out. I was out in round numbers $25,000 of my money put into the Silver Hill Mine, Section 5; I had obtained credit for the company at that time of about $44,000, I think it was; and it was almost too heavy a load for me to carry alone; that the company could take the mine any time they were able to off my hands at its cost, or if I had got to stand under all of this, I thought it was only fair that I should have some compensation for it. Mrs. Willis said she thought so, too, and Miss Doherty joined in that, and I had a talk with Mr. Osborn and he agreed to the same thing; so we agreed between us if I furnished a lease to pay me one-half of the net, and that would be a fair division; so I agreed to carry on the business on that basis. I talked to Mr. Peat in regard to that same proposition and my brother who in February was a director, and Miss Doherty who became a director on January 31st, I believe —I only know that from the minutes. At the time of this transaction, I and Miss Doherty and my brother had just become directors; I was in Texas when I was elected a director; I came up about ten days afterwards; I was in Texas in January and returned here in February'' (pages 689-90, 691-2).

And in speaking of these conferences, Miss Doherty testifies in general corroboration of the history related

by Mr. Noyes, and to no fact which contradicts it; and because, both upon direct and cross-examination, Miss Doherty explained the confidence which Mrs. Willis had in Mr. Wm. S. Noyes and how she relied, and Miss Doherty herself relied, entirely upon his judgment, as to the mode of meeting the disaster which had fallen upon the company, this appellee, in whose disordered imagination no act of any one differing in opinion from him can possibly be right, must, if you pelase, describe this lady, Miss Doherty, as the echo and pliant tool of Mr. Noyes. But we are quite content to submit that phase of the case to the same discriminating judges who disposed of *Cowell v. McMillin,* 177 Fed. 25: And whether Mrs. Willis or Miss Doherty was the echo and pliant tool of Mr. Noyes or not, whether surprise and sudden action without due deliberation were or were not the chief ingredients in Mrs. Willis' course of conduct, what was wrong with the suggestion contained in the letter of January 23, 1913, that such steps should be taken by the larger stockholders in the company as to prevent a recurrence of such a disaster as the Osborn shortage? Was not the suggestion reasonable, well timed, and intended for the betterment of the company? Who dare say that it was not? Why should not that suggestion have been accepted by Mrs. Willis and by Miss Doherty, and what wrong was there in Mrs. Willis doing for Mr. B. S. Noyes one-half of the same thing which Anson Mills did for this appellee, in the matter of transferring stock into his name? If it was right for Mills to give 10,000 shares of stock to Overton, what was wrong about Mrs. Willis giving 5000 shares of

stock to Mr. B. S. Noyes? What concern of this appellee was it that she gave Mr. B. S. Noyes 5000 shares of stock, any more than it was any concern of hers that Mr. Anson Mills gave W. S. Overton 10,000 shares of stock? The stock was Mrs. Willis personal property; she had the absolute right to transfer, and Mr. B. S. Noyes to receive, those shares of stock, and, as we pointed out when discussing this subject matter in our opening brief, if there were any fraud *inter partes,* that would be no concern of any third person, but would be a matter of which Mrs. Willis alone could take advantage. But this record fails to disclose the existence of any impropriety whatever as between Mr. B. S. Noyes and Mrs. Willis in this matter of the five thousand shares of stock; the evidence discloses that she made to Mr. B. S. Noyes a voluntary gift of that stock, which was a perfectly valid act which she had an absolute right to do; and never once that we are advised of, during the reminder of her life, did she ever, by word or act, seek to impeach the *bona fides* of this transfer. And in so far forth as consideration is concerned, so far as this record discloses, Mr. B. S. Noyes gave to Mrs. Willis precisely the same consideration for the transfer of the stock to him as the present appellee gave to Anson Mills for the transfer of the stock to him.

In other words, taking together the whole record in this case, and considering all of the facts, no justification, we submit, can be found for the extravagant and far-fetched assertions contained in appellee's brief concerning the relations between Mrs. Willis and any of these defendants.

THE PURCHASE OF SECTION FIVE:

> At the time of the acquisition of Section 5, Mr. Noyes, being then not a director but a "salaried employe" of the Company, was under no duty or obligation to the Company either to refrain from acquiring the section for himself, or to acquire it for a Company whose fiduciary he was not, which had no right, title, interest, estate or expectancy in the section, which had never formulated any plans as to the section that any act of his could have frustrated or did frustrate, which was not organized to acquire the section, which had never expressed any intention or purpose to acquire the section, which had never originated a negotiation or expended a dollar in any effort to acquire it, which was financially unable to acquire the section even if it entertained the intent to do so, which was then confronted with a depleted treasury, upon one side, and an $80,000 cyanide plant installed upon credit obtained by Mr. Noyes from his friends, upon the other side, and which was so utterly without credit that neither the bank at the place of the works nor the bank at the place of the office would lend it necessary sums without additional security or a personal guaranty: nor was he under any duty to make loans to it or purchase property for it from his private funds, or by the use of his personal credit.

This subject matter has been so fully discussed in our opening brief that we are content to rest our case thereon, and shall do no more at this place than call attention to one or two examples of the inability of this appellee to distinguish between a fact and his hallucination about a fact. Speaking with reference to the acquisition of Section 5, on pages 112-113, a reference is made to our brief which seems to us to be rather singular. We introduced our discussion concerning Section 5 by a brief paragraph on pages 105-6, summarizing the general facts with regard to Section 5 before descending to specific particulars for the purpose of ascertaining what, if any, fraud tinged Mr. Noyes conduct with regard to the acquisition of this section; and it is this

portion, and this portion only, of our discussion which is referred to by the appellee upon pages 112-13 of his brief. But in discussing Section 5, we sought to develop the various propositions numbered from 1 to 17, which may be found conveniently grouped in the index to our opening brief, under the general heading of "Section 5"; but we look in vain through the appellee's brief for any orderly, systematic, logical discussion of these propositions, and we look equally in vain for any effective answer to them. But, upon page 113 of his brief, after referring to our mention of the early vicissitudes of this property, of the fact that Mr. Noyes purchased it with his own funds, and of the fact that publicity was given to that purchase to the leading stockholders directly at the time of its acquisition and to all the stockholders by the annual report of 1913, the appellee goes on to say that "there never was a report to any stockholder, or any annual report sent to the eastern stockholders, showing that Noyes paid $24,009.33 for the property or any other sum". It must, however, be remembered that the annual report of 1913, after pointing out the inefficacy of the old pan-amalgamation method and the necessity for the installation of the cyanide plant and the natural indebtedness incident thereto, goes on to discuss the following facts:

> "Early in 1913, Section 5, adjoining the Presidio Mine was put on the market for sale. This company being unable to buy it, having exhausted its credit on the new installations aforementioned, it was purchased by the writer (Mr. William S. Noyes) and an arrangement made whereby this Company will work it on terms of a division of the net, and perhaps will purchase the same later on. Late developments of Section 5 indicate that it will be a source of large revenue" (see this report quoted at pages 628-630).

In a desperate effort to escape the legal consequences of the due receipt of this report by the appellee, the complaint is now made that this report, though stating all of the germane facts, omitted to state the actual price paid by Mr. Noyes when he purchased Section 5; and we suppose that if this report had disclosed that amount, it would then be objected that no disclosure was made of the particular legal tender through which the purchase was made, whether gold, silver, currency, or what not. No claim is anywhere made by this appellee that he ever attempted to ascertain what the purchase of Section 5 cost Mr. Noyes; he does swear that he desired to ascertain from Osborn and Peat for what sum the section had been offered to the company, although he does not swear that he prosecuted his inquiries any further than Osborn or Peat, and indeed refused to go to the office of Mr. Noyes for the purpose of obtaining the information that he desired (586-7). And since the annual report of 1913 plainly declared that Section 5 was purchased by Mr. Noyes, and since no effort is disclosed by this record to have been made by this appellee to ascertain the cost of that section to Mr. Noyes, we think it comes with an ill grace from this appellee, at this late day, to complain that this report omitted to state a fact which he himself never so much as turned a finger to ascertain. He was informed that the section was purchased by Mr. Noyes; no fact in this record can justify the statement that Mr. Noyes ever, at any time or place, or from any person whomsoever, concealed the amount which he paid to secure Section 5; and there is no fact which repels the contention that if this appellee had followed up the information given to

him by the report, he would have failed to have ascertained the cost of the section to Mr. Noyes. Never before, so far as we are advised, whether in the pleadings in this cause or anywhere in the testimony has any complaint been made that the annual report of 1913 failed to disclose the purchase price of Section 5 to Mr. Noyes; and we denounce the complaint now made as the merest sham of an afterthought, conjured up by the pressure and exigencies of the cause.

Another purely verbal criticism of the annual report of 1913, appears on page 124 of the appellee's brief, and there much is sought to be made of the fact that the report reads, "early in 1913, Section 5, adjoining the Presidio Mine was on the market for sale"; and it seems that this statement that "early in 1913", Section 5 was on the market for sale, is indicative of some deep, dark, mysterious act upon the part of Mr. Noyes. We know, of course, that the Lewisohn option expired in November, 1912, and that upon learning this, Mr. Noyes, after calling to the attention of the principal stockholders the fact that the section was for sale, after urging them, without success, to the policy of acquiring that section for the company, and after having failed in this regard, expressed his intention of acquiring the property himself, and commenced his negotiations for its acquisition. These negotiations ran along through 1912 and 1913, and it was not until May, 1913, that he finally secured the deed to the property. In January, 1913, he had not yet acquired all of the shares of the Silver Hill Mill and Mining Company, the then owner and holder of Section 5; on January 25, 1913,

he had paid for all of the 1500 outstanding shares except 256 shares; of these remaining shares, 252 were paid for in March, 1913, and the final four shares were paid for in April, 1913; and as we have already suggested, it was not until May 26, 1913, that he finally obtained the deed to the section (706-709). How, we may ask, bearing in mind all of the facts, can any reasonable person profess, with a decent degree of seriousness, to have been misled by the use of the expression "early in 1913"? What sort or character of detriment was occasioned this appellee, or the Presidio Mining Company, by the expression "early in 1913" contained in this annual report? Upon what fantastic theory is a charge of fraud claimed to be established by the use of the expression "early in 1913" in this report? The contention of this appellee in this regard is, we submit, childish to the last degree—as childish as the remainder of the criticisms contained on pages 124-5 of this appellee's brief.

On page 127 of appellee's brief the proposition that, at the time of the acquisition of Section 5, the Presidio Mining Company had no right, title, interest, estate or expectancy in that section, seems to be, as it must be, conceded and surrendered; but the attempted answer sought to be made thereto is no answer whatever. If the Presidio Mining Company had no right, title, interest, estate or expectancy in Section 5, under what duty, then, was Mr. Noyes toward the Presidio Mining Company with reference to the very section in which that company had neither interest nor expectancy, which would inhibit him from becoming a purchaser of that section? If no relation existed between the Presidio Mining Company and Section 5 at the time of its acqui-

sition by Mr. Noyes, what was there, in law, equity or morals, to restrain him from becoming a purchaser of that property if he desired to do so? The appellee's brief is very free with the expression "confidential agent"; but was Mr. Noyes the confidential agent of the Presidio Mining Company as to a tract of land in which that company had no right, no title, no interest, no estate, or no expectancy? While the brief for the appellee is liberally bespangled with the expression "confidential agent", yet it is significantly silent as to any claim that Mr. Noyes was anybody's confidential agent in so far as this unrelated section was concerned. And if there were no relation between the company and the section, if this company had no rights or expectancy in that section, what right had that company to any disclosure by Mr. Noyes of any information in his possession concerning that section, assuming he had any particular information in his possession concerning that section? When one speaks, as this appellee speaks, of concealing facts, the implication is that the person or company from which the facts have been concealed was a person or company who had some right to be advised concerning the facts concealed; but where, as here, the company was totally unrelated to the section, the legal conception of concealment effects no entry into the situation. And of what use in this discussion is the rather flamboyant expression that Mr. Noyes "betrayed and used his knowledge of the property gained through the company's service". If this means anything, it must mean that he betrayed the Presidio Mining Company in acquiring Section 5; but if the Presidio Mining Company had no right, title, interest, estate or expectancy in that

section, upon what foundation is this pretended betrayal to be based? The very thought of a betrayal implies some right or expectancy in the victim of the betrayal; but what right or expectancy had this Presidio Mining Company in Section 5 at the time of its acquisition by Mr. Noyes? And equally idle is the reference to "knowledge of the property gained through the company's service". Unless some duty were owing the company by Mr. Noyes concerning Section 5, which duty, in its turn, would rest upon, or grow out of, some interest or expectancy of the company in the section in question, the user by him of any knowledge of Section 5, whether gained through the company's service, or otherwise, could furnish neither the company nor its stockholders any ground for complaint, because, absent the duty resting upon the right or expectancy, no breach of duty could be traceable to such user of such knowledge. As remarked in the Lagarde case:

> "Proprietorship of the Martin property may have been important to the corporation, but it is not shown to be necessary to the continuance of its business, or that the Lagardes' purchase in any way impaired the value of the corporation's property. In such case it is immaterial that knowledge of the situation was gained by the Lagardes through their connection with the corporation, since no breach of duty is traceable to such knowledge. The duty is only co-extensive with the trust, so that in general the legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purpose of its creation. * * * Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit, enterprises or investments, which, though

> capable of profit to the corporation, have in no way become subjects of their trust or duty."
>
> *Lagarde v. Anniston Lime Co.,* 28 So. (Ala.) 199, 201-2.

And see a relevant analogy from the law of partnership, in *Wheeler v. Sage,* 68 U. S. (1 Wall.) 518, where Mr. Justice Davis points out that

> "each partner is the agent of copartners in all transactions relating to partnership business, and is forbidden to traffic therein for his own advantage, and if he does will be held accountable for all profits. But beyond the line of the trade or business in which the firm is engaged, there is no restraint upon his right of traffic";

and see this decision quoted and approved in *McKenzie v. Dickinson,* 43 Cal. 119, holding that the obligations of co-partners refer only to the conduct of the actual business in which the firm is engaged, and that beyond and outside of such business there is no restraint upon the right of either party to traffic for his own profit; and see, also, the principle of these cases applied in *Latta v. Kilbourne,* 150 U. S. 524, 550. In a word, the dealings between Mr. Noyes and the Silver Hill Company were not within any duty he owed to the Presidio Mining Company, or within any trust relation between him and the Presidio Mining Company; and since the Presidio Mining Company had no right, title, interest, estate or expectancy in Section 5, it could have had no right or claim against Mr. Noyes in respect of that section which could in any maner or to any degree prevent him from becoming a purchaser thereof.

The claims of the appellee in the respects just criticised, are repeated at various places throughout his

brief, as will be observed upon reading that document; but we think that those claims, however frequent, are adequately met by the discussion contained in our opening brief and in this reply brief.

INTERESTED LOANERS OF MONEY:

> **Where the acts of men are fairly open to two constructions, the one favoring fair and honest dealing, and the other favoring corrupt or oppressive practice, the former will be accepted and the latter rejected.**

It is a familiar principle, founded upon the accumulated experience of judges, legislators and the general course of human history that men are honest rather than dishonest, and that private transactions are fair and regular, rather than the reverse; and this criterion is recognized by all authorities, state and federal, and is incorporated into the California Code of Evidence, in Section 1963, Subdivisions 1, 19, 20, 28 and 33. Nothing, indeed, could well be more misleading than to look with icteric eyes at that human nature which "constitutes a part of the evidence in every case" (*Green v. Harris,* 11 R. I. 5), and which "is something whose action can never be ignored in the courts" (*Louisville Trust Co. v. Louisville Ry.,* 174 U. S. 688), and to attempt to reason about that human nature upon the theory that the only motives of human conduct are those which impel men to oppress and despoil others, as if they were the only motives by which men could possibly be influenced. Why, we ask, should this case be sought to be disposed of by putting all the weights into one of the scales, by assuming that the only motive by which men are influenced is the will to opress and despoil, and by attempting to reason as if no human

being had ever sympathized with the desires, hopes or feelings, or been gratified by the thanks, of a fellow man? But who, we ask again, will seriously dispute the proposition that in actions going upon fraud, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing? (*Ryder v. Bamberger,* 172 Cal. 791.)

This thought was suggested to us in looking over this appellee's brief, wherein he claims that Mr. Noyes obtained the loans which enabled him to purchase Section 5, because of selfish hopes on the part of the lenders of the money of future business with the Presidio Mining Company. This suggestion is made at various places in the appellee's brief, and perhaps as fair a type of these statements as could be selected will be found upon page 144 of the appellee's brief, where the claim is made that

> "the money used in purchasing said property (Section 5) came from interested parties who were the company's beneficiaries:
>
> (a) Benton Bowers the contractor hauling freight and furnishing wood to the company;
>
> (b) The Marfa National Bank which benefited by the change in the bank account, its $10,000 loan to Noyes being secured by Presidio Mining Company's stock and the endorsement of William Cleveland, its director, anxious to get business for the bank;
>
> (c) Harry Young, the Shafter storekeeper, who would participate in the continued prosperity of the company."

We repudiate the imputation that any one of these men was an "interested party" in these transactions in any sinister sense, and we insist that any fair reference to this record will demonstrate the absence of any evidence of illegitimate or improper interest by these men; but, suppose that they were "interested parties", what of it? Certainly, their interest was not aroused by the prosperous condition of the company at that time; they, being upon the ground, were as familiar as the rest of the Presidio Mining Company world with the plight of the company at that time; and there was nothing in or about the then condition of the company's affairs which could have influenced them to advance to it any moneys whatever. In a word, the company itself was not a factor, and could not have been a factor, in developing these loans. On the trial below, Harry Young was not a witness and there was no personal evidence from him as to the motives which actuated him in these transactions. At the trial below, Benton Bowers was a witness and, while it appeared that he had been doing hauling for the company, yet no inquiry was made as to the specific motive which controlled his conduct, although it did appear that he was an old friend of Mr. Noyes. During the trial below, Mr. Cleveland was a witness, and testified that "in 1912, and the early part of 1913, I would not have loaned the Presidio Mining Company any money without additional security" (904); and in our opening brief, we endeavor to make clear, in this connection, that the controlling consideration which induced the Marfa National Bank to make this loan to Mr. Noyes was, not the Presidio Mining

Company stock, because that was no security, but the endorsement of Mr. Cleveland's name upon Mr. Noyes' note,—a view of the situation which is fortified by the statement of Mr. Cleveland, at the bottom of page 902, to the effect that the bank "wanted some security, so I went on the note with Mr. Noyes at the bank; the bank required an endorser"; and the conditions revealed by this testimony would be without reason or necessity if, as suggested by this appellee, the Presidio Mining Company's stock was the efficient security upon which the loan was made, or if the credit of that company were as exalted as appellee claims it to have been.

The loan from the Marfa National Bank to Mr. Noyes antedated the transfer of the bank account of the company from the San Antonio Bank to the Marfa National Bank. Reference to any authentic map of the State of Texas (*Brown v. Piper,* 91 U. S. 37) will make it clear that while Marfa is but a comparatively short distance from Shafter, San Antonio is probably as far from Shafter as Los Angeles is from San Francisco; and a sufficient reason for the transfer of this account to a readily accessible bank can be found in the proximity of the Marfa National Bank. It would be as irrational for the company to do its banking at San Antonio, with the Marfa National Bank within easy distance, as it would be for a San Francisco merchant to do his banking at Los Angeles with the San Francisco banks within easy reach; and this natural and reasonable view of this matter should, upon all principles of interpretation in this class of cases, be accepted, rather than one which would impute without reason the presence of irregular motives.

We have asked the question, assuming that these moneys were loaned to Mr. Noyes by these parties from interested motives, what of it? But it must not be assumed from this that we concede that these loans were made from interested motives, or from improperly interested motives. Mr. Bowers and Mr. Noyes, like Mr. Cleveland and Mr. Noyes, had been friends for very many years, and both Mr. Bowers and Mr. Cleveland had ample opportunities during these years to study Mr. Noyes' characteristics; and the circumstance that each of these men was familiar with the deplorable condition of the company in the winter of 1912, but nevertheless were ready and willing to make these loans to Mr. Noyes, certainly reflects no discredit upon either party to the transaction, and furnishes an explanatory motive therefor.

So far as Mr. Young is concerned, it may be remarked that throughout the trial and throughout the appellee's brief, we have heard so much of the Gleim Company and its relations with the Presidio Mining Company that the reference to the Young business house comes with something of a surprise; and we are not aware from the declarations of this record, either, that during the past Harry Young participated in the business of the company to any appreciable extent, or that during the dealings between him and Mr. Noyes in the winter of 1912-13 any arrangement was made either for the suppression of the Gleim Company or for any additional participation by Mr. Young in the business of the company; and it may further be added that Mr. Young made no loan of any money to Mr. Noyes. Harry Young was the principal individual owner of the stock

of the Silver Hill Mill and Mining Company and he sold his stock to Mr. Noyes for $10,000, Mr. Noyes paying him $5,000 and giving him his note for the remaining $5,000 (683-4); and this was the length and breadth of the transactions between Mr. Noyes and Mr. Young. What there was in all of this to fasten the imputation of improper motives on these men in these very natural and ordinary transactions, we must confess our inability to understand; and we urge upon the court that no tangible fact is anywhere disclosed which would authorize this appellee in seeking to impress upon these transactions any sinister aspect.

ALLEGED SECTION 5 EXPENSES:

These matters, which are fully explained in the record and opening brief, establish neither the commission of any fraud by Mr. Noyes, nor the acquisition of Section 5 by the Company.

This topic also has been referred to in our opening brief, and it is we think of a character not to detain us long in this place. But, as usual, statements are made in the appellee's brief which, according to our understanding, do not respond to the statements in the record. Thus, on page 7 of appellee's brief, after referring to the business in connection with Mr. Noyes' acquisition of Section 5, the statement is made that

> "all Noyes and Gleim's travel and other expenses were paid by the Presidio Mining Company during these transactions";

and on page 47 it is stated that

> "the expenses incident to examination of the property and sampling were paid by the Presidio Mining Company, and the examinations made and the sampling done by the Presidio Mining Company's employees";

and on pages 136-7, the statement is made that

> "vouchers 14 and 18 and 23 show company expenditures of $433.55, traveling expenses Noyes and Gleim incurred on account of cyanide plant and purchase of Section 5. The assaying was done by paid employees of the Presidio Mining Company. Voucher 19 shows $22.05 paid for telegrams. The company never was reimbursed for any part of said sums";

and, for a final example, it is stated on page 145 that

> "the Presidio Mining Company paid all his own and Gleim's expenses while securing the options on the stock, while acquiring the same and closing the deal, even to the telegrams concerning the acquisition of said Section 5".

The difficulty with these references is that they do not fairly reflect the disclosures of the transcript, and are therefore misleading. So far as the statement is concerned above quoted from page 7 of the appellee's brief, we are at a loss to understand what the passage means, and where in the transcript in evidence can be found any support of the statement made. So with the statement quoted from page 47: we know of no voucher or other document, or testimony contained in this record which supports the proposition that the expenses incident to examination of the property were paid by the Presidio Mining Company. We believe that there is evidence in the record that the Presidio Mining Company took samples from Section 5, but it would naturally sample the ore that it intended to work whoever might have been the owner of the ore. The same criticism applies to the passage quoted from pages 136-7: there, the effort is made to convey the impression that the company expended $433.55 for investigating Section 5, whereas the testimony clearly shows that the trip of

Mr. Noyes to Texas was necessary to arrange for and start the construction of the new cyanide plant, and that no money was expended in making the arrangements for the purchase of Section 5. This is true, also, of the $22.05 spent for telegrams; there is no proof whatever, anywhere in the record to differentiate this item from any other of the monthly petty cash items of the general business of the company; and certainly, there is no evidence whatever connecting this item for telegrams with the acquisition of Section 5. On the contrary, the only testimony upon this subject which we can recall indicates that "those telegrams cover business of the cyanide plant and that Osborn shortage" (764). All of these criticisms are equally true of the passage above quoted from page 145 of the appellee's brief. We think, and submit for careful consideration by the court that the testimony of Mr. Gleim in connection with these matters (799-800), makes it very plain indeed that this appellee has no just ground for criticism in the present respect; and if he has established no case of fraud otherwise, he has certainly established none through the medium of these particular items.

KNOWLEDGE OF MR. NOYES AND MR. GLEIM CONCERNING SECTION 5:

> **The evidence in this cause fails to invest either Mr. Noyes or Mr. Gleim with any special or peculiar knowledge of Section 5: from 1897 to 1912, neither had visited the section upon any occasion disclosed in the testimony; and in 1912, Mr. Noyes did no more than make a limited examination of a single ore body, Stope 13 (749).**

In the appellee's brief, speaking of Mr. Noyes, it is stated on page 112 that

> "the history of both sections (8 and 5) was well known to William S. Noyes, as he had operated Section 8 for 29 years in December, 1912, and Section 5 for many years as well, and during the period of operation of both parties, the ores from both sections were treated in the one mill, likewise under the direction of William S. Noyes".

But when we turn to the record to ascertain exactly what was Mr. Noyes' antecedent relationship with Section 5, we learn that many years before, and prior to 1897, the Cibolo Company had been operating in Section 5, having its milling done by the Presidio Company; in 1897, the Cibolo Company gave up its lease and ceased to operate the property (1059); and from 1897 down to December, 1912, there is no proof whatever that Mr. Noyes had any relations whatever with Section 5, or even visited it, or had any other knowledge of or concerning it than this, that the Lewisohn engineers made such a report to their principal that he rejected the purchase of the property. This statement is confirmed by the testimony of Mr. Noyes who states on page 246 of the record that

> "while I was living down in Texas I had charge of the Cibolo Creek Mill and Mining Company which operated at one time Section 5 under my supervision. I operated Section 5 for some years as well as Section 8. I was pretty familiar with the ground *at that time,* and the location of the ore bodies *that were known*";

and also by the following statement by Mr. Noyes on page 686 of the record, dealing with Section 5 when Mr. Noyes entered it during the last days of December, 1912:

> "I found Section 5 just as I had left it in 1897, when I closed it down for the Cibolo Creek Mill and Mining Company, with the exception that the engineers that had been examining it for the New York people had run two

> drifts, and opened up a new pocket of ore which had not existed when I left the mine, or was not known when I left the mine."

The foregoing illustrates the extent and scope of Mr. Noyes' acquaintance with Section 5 in December, 1912; and we submit that it scarcely supports the statement made on page 140 of appellee's brief that "Mr. Noyes was the only person thoroughly familiar with Sections 5 and 8". And it may be asked why, if Mr. Noyes were "thoroughly familiar" with Section 5, he should find it necessary to examine that property and "satisfy himself it was worth the money before paying the purchase price", as is affirmed on page 47 of the appellee's brief? And so far as Mr. Gleim is concerned, Mr. Noyes tells us that he reached Shafter on the night before Christmas, 1912, "and then the next one or two days, I took a look through the Silver Hill Mine. Mr. Edgar M. Gleim accompanied me" (685-6); and so far as the evidence in the cause advises us, this was the first occasion during his lifetime when Mr. Gleim ever visited at Section 5, as we interpret the testimony. Thus, at page 567, speaking of the occasion when he and Mr. Noyes entered Section 5, Mr. Gleim stated,

> "we went into Section 5 to see if the people who had been prospecting the section there, had turned it down, had developed anything we did not already know. We found the mine practically the same as the Presidio Mining Company had left it, with the exception of drill holes put by the Lewisohn Bros. and with the exception of a small prospect in the bottom of one particular stope, it was the stope which we afterwards named Stope 13, which is the stope which is at the present time called Stope D";

and at page 801, Mr. Gleim merely states that

> "I was in charge of the mine in the months of January, February, March and April, 1913, about or prior to that time, I visited Section 5 with Mr. Noyes";

and so far as we can discover these are the only passages in the record throwing any light on Mr. Gleim's first visit to Section 5. In this connection it may be pointed out that the claim of the appellee, with reference to Mr. Gleim's knowledge concerning Section 5, goes no further than to state that

> "at that time (November, 1912) E. M. Gleim was thoroughly familiar with recent developments in Section 5, by engineers exploring and developing it" (brief, pages 130-131),

a phase of the matter which will presently be referred to again. Upon the whole, then, we see no reason for enlarging the alleged knowledge of either of these witnesses beyond that disclosed by a fair construction of their testimony.

THE ORE BODY IN SECTION 5:

> **"No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out * * * It is, in the nature of the thing, utterly speculative; and everyone knows the business is of the most fluctuating and hazardous character" (Tuck v. Downing, 76 Ill., 71, 94; approved in So. Dev. Co. v. Silva, 125 U. S. 247). "The quantity of ore 'in sight' in a mine, as that term is understood among miners, is at best a mere matter of opinion. It cannot be calculated with mechanical or even with approximate certainty. The opinions of expert miners, on a question of this kind might reasonable differ quite materially" (So. Dev. Co. vs. Silva, 125 U. S. 247; Richardson v. Lowe, 149 Fed. 625, 634).**

In our opening brief, we had occasion to make some remarks concerning the characteristics of the ore encoun-

tered in the mining property involved in this action; we pointed out that the property is what is known as a pocket mine, the ore bodies consisting of replacement deposits in limestone which are extremely irregular, both as to quantity and quality; and that any attempt to judge from exterior indications as to either the quantity or the value of a face of ore in sight, would be the merest conjecture. These statements were, of course, based upon the testimony of Mr. Noyes and Mr. Gleim. But in dealing with this topic, the appellee takes the position that when Mr. Noyes and Mr. Gleim visited Section 5 upon the occasion just hereinabove referred to, and examined the ore bodies,

> "they ascertained that there were from 10,000 to 20,000 tons available in the new body alone uncovered by the Lewisohn engineers; assays made show 45 oz. of silver to the ton. The ore body was estimated to be worth from $100,000 to $400,000. Noyes testified that from his experience the mine always produced two or more times as much ore as could be measured" (brief, p. 131);

and the same thought is stated at pages 120-1 of the brief in the following language,

> "the examination in December, 1912, of said property, after tying up the Silver Hill stock, made by both Gleim and Noyes, thoroughly satisfied both said last named as the officers of the company what the possibilities with Section 5 were in conjunction with the equipped mine and mill of the Presidio Mining Company. There was no conjecture about it, for they had a body of ore worth from $100,000 to $400,000. With a plant to treat the same, the results were certain. There was nothing conjectural about it".

But, speaking of this body of ore, Mr. Noyes makes it very clear that he was not describing its extent or assay value with any degree of absolute finality. He

explains, at page 686, that the Lewisohn engineers had run two drifts and opened up "a new pocket of ore" which was not known when he was last in the mine. He then states that "we ascertained the possible extent of that body of ore as much as we could", plainly dealing in such possibilities as presented themselves under the existing circumstances. He then makes an estimate, "guessing roughly" at the extent of the exposure of the ore, and

> "I made a rough guess that it might contain anywhere from ten thousand to twenty thousand tons of ore, depending upon the outline of the ore body, which in those pockets of limestone is very largely conjectural";

and he then hazards a conjecture as to the probable contents of the ore, saying

> "I suppose about forty ounces per ton were the probable contents of that ore."

And on page 749, Mr. Noyes advises us that

> "the only ore body that I examined in Section 5 before paying for it or for the stock of Section 5 was that Stope 13, and that examination was necessarily confined to looking at these two drifts and the winze."

In this connection, attention may be directed to the quotation at the bottom of page 121, from Mr. Noyes' report to Mr. Boyd, dated February 16, 1907. It will be remembered that, having in mind the betterment of this company, Mr. Noyes in 1907 urged the installation at that early period of a cyanide plant; and it was in furtherance of this project that he wrote the report from which this quotation is made. Passing by the circumstance that the quotation as given in appellee's brief does not in our opinion properly reflect the report in question,

it is to be observed that this report had nothing whatever to do with Section 5, and was limited to the company's own mine, Section 8; but since wide differences within restricted areas of ore productivity is not an uncommon thing in mining, since it is not shown that the two sections were equivalent in the character and quality of their ore, and since the record in the present cause of itself exhibits those marked fluctuations between Section 8 and Section 5 so common in mining history, we fail to appreciate just how Mr. Noyes' comments upon Section 8 in 1907, can throw any light upon the productivity of Section 5—we know of no evidence in this record establishing as to Section 5, "that it has always yielded two or more times as much ore as could be actually measured".

Further light is thrown upon this matter by the testimony of Mr. Gleim. In the "control the management" letter from Overton to Gleim, written three days after the present suit was commenced, Overton describes Gleim as "an honorable and efficient official" who "is excluded in my complaint of the management"; in the appellee's brief (pages 130-1), the statement is made, speaking of November, 1912, that "at that time E. M. Gleim was thoroughly familiar with recent developments in Section 5 by engineers exploring and developing it"; and it is, therefore, of some interest to ascertain the judgment of this "honorable and efficient official" who "was thoroughly familiar with recent developments in Section 5". When, therefore, we turn to the testimony of Mr. Gleim, we find that he visited Section 5 with Mr. Noyes.

"At that time, we found in the bottom of Section 5 that place (Stope 13, or as it is now called Stope D), and that was the only one of any importance that was opened up. It looked very favorable to us. We made a rough estimate of the total number of tons that we thought would be in that stope approximately; we figured that there was anywhere from ten thousand to twenty thousand tons of ore exposed—not blocked out, however,—because that was impossible."

He then goes on to give his estimate as to what the estimated number of tons would be worth, following which, he was asked:

"Q. You did ascertain, then, that it was a body of ore that was worth approximately $100,000, in Section 5, and which you were able to check up in this particular stope 13?

A. No, sir. I did not say that was worth $100,000—$100,000 gross recovery."

He then goes on to explain that there was $100,000 worth of ore according to his estimate, the net value of which would be the difference between $100,000, and the cost of mining and of extraction, whatever that cost might be. He said he thought the net result would be favorable, as it was high grade ore, and then proceeded to say:

"That body of high grade ore we found would have been of no value by itself. Its main value lay in the fact that we could use it to grade up the low grade material which we knew was standing in the mine, and which was absolutely of no value by the pan-amalgamation process. It was very doubtful if there was enough ore in Section 5 to justify a metallurgical plant. That is why the property was turned down by the people who had previously examined it."

Thereafter, during his cross-examination, the following occurred:

"The ore bodies in both Section 8 and Section 5 are replacement deposits in limestone. They are extremely irregular, and there is no way of blocking them out. They are just as irregular in value, as they are in quantity. You simply have to base an estimate on your experience, and make a guess. When I made a guess that the ore body contained from 10,000 to 20,000 tons, the conditions were such that I could not absolutely say that it contained at least 10,000 tons—absolutely not at all; it was an estimate of a minimum of 10,000 tons, and a maximum of 20,000 tons. That was determined by making what we call an assay plan, taking what you think is reasonable for the extension of the ore into the country rock, and then making your estimate of the tonnage.

The COURT. I do not think you need to go into that, because I understand that the testimony of the witness in chief was that it was a mere estimate based upon his experience and observation in working deposits of that character.

Mr. HARDING. I want to show that after all there may have been 5,000 tons or 50,000 tons.

The COURT. Certainly. That deduction may be drawn from the evidence as it stands. There is no use in taking up the time to cross on a matter of that kind. It was sufficient to induce you as a miner, and Mr. Noyes as well, to come to the conclusion that Section 5 would be a valuable acquisition.

The WITNESS. A. Yes, that it had some highgrade ore, which was something we have to have, having the low-grade bodies we did have; we had to take a chance; it was just simply a chance; it was because we could not block out the ore bodies."

Taking this testimony as a whole, we respectfully submit that it supports our views as to the purely speculative character of any such conjecture as that referred to in the testimony just quoted; and we submit further that this testimony itself, fairly read and fairly interpreted, formulates nothing further than a conjectural

opinion upon the part of these witnesses. It is common knowledge that

> "there is no class of property more subject to sudden and violent fluctuations of value than mining lands".

Patterson v. Hewitt, 195 U. S. 309-320-321; and it is equally clear that, as observed in *Tuck v. Downing,* 76 Ill. 71-94,

> "no man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. * * * It is, in the nature of things, utterly speculative and everyone knows the business is of the most fluctuating and hazardous character".

Speaking upon this subject in a silver mine case, the Supreme Court of the United States points out that

> "the quantity of ore 'in sight' in a mine, as that term is understood among miners, is at best a mere matter of opinion. It cannot be calculated with mechanical, or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially".

The court then goes on to observe:

> "In the case of Tuck v. Downing, 76 Ill. 71, 94, the court says: 'No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. "The sight" determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative; and everyone knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop.' "
>
> *Southern Develop. Co. v. Silva,* 125 U. S. 247.

And when this same subject matter came on for consideration before the Circuit Court of Appeals for the Eighth Circuit, that learned court observed, speaking of mining property:

> "This property, from its nature, is of doubtful and uncertain value. No one can peer into the bowels of the earth and tell us with accuracy what is found there. It is so difficult to determine even the quantity and value of ore in sight that the Supreme Court in Southern Development Co. v. Silva, 125 U. S. 247, 252, 8 Sup. Ct. 883, 31 L. Ed. 678, says:
>
> 'It is at best a mere matter of opinion. It cannot be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially.'
>
> These observations are made by the Supreme Court concerning an estimate of ore actually 'in sight' as that term is understood among miners. But that court in the same case goes further, and, quoting with approval from Tuck v. Downing, 76 Ill. 71, 94, says:
>
> 'No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. "The sight" determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of things, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop.'
>
> From such approved reflections concerning the character of the property, which defendants purchased, and which we are now asked to say was worth less than they paid for it we find that we are dealing with a subject uncertain in actual value, and which, from the speculative feature involved in dealing in it, becomes almost impossible to accurately value."

Richardson v. Lowe, 149 Fed. 625, 634.

THE FINANCIAL ABILITY AND CREDIT OF THE COMPANY:

During 1912-13, a local (Marfa) banker would not have loaned money to this Company without additional security: during 1913, a local (San Francisco) bank refused to loan the Company needed sums without the personal guaranty of those now accused of looting the Company, and that guaranty was given by them: during 1913-14, this Company was compelled to accept a loan of Ten Thousand Dollars from the man now accused of pillaging it: the credit upon which the cyanide plant was installed was procured by the man now charged with wrecking the Company; and as to Section 5, the Company formally admitted in writing the otherwise established fact of its financial inability.

At various places throughout appellee's brief, references are made to the credit and general financial position of the company at the time of the acquisition of Section 5; and some forms of these references may be briefly referred to for the purpose of suggesting their scope. On pages 48 and 144, the assertion is made in substance that it was due to the company's credit that Mr. Noyes was able to secure the money with which he purchased Section 5; between pages 86 and 89, a labored effort is made to support the claim that the company was prosperous; at page 104, the claim is made that the company was in good financial condition; and on page 119, large claims are made for the credit and financial standing of the company. In our opening brief, we have discussed this phase of the case. We pointed out that by reason of low grade ores, depreciated market price for silver, and high cost of extraction, the situation of the company became so desperate in 1907 that the directors were constrained to order the mine closed down and the employees discharged. We pointed out that between 1907 and 1912, the company was barely

able to keep its head above water, earning only in round numbers about thirty thousand dollars, over one-half of which went into an internal combustion engine, and the balance into needed improvements at the plant at Shafter. We pointed out that the conditions surrounding the company were such in 1912 that a change from pan-amalgamation to cyanide had become imperative. We pointed out that the condition of the company, as reflected in the conduct of its stockholders was such that during 1908 over 100,000 shares of the capital stock changed hands, that the donor of the appellee's stock had "lost confidence", and had transferred out of his own name and into the names of others 16,000 out of 17,000 shares of stock. We pointed out that when the establishment of the cyanide plant became imperative, it was through the influence and friends of Mr. Noyes that the credits were obtained which enabled that plant to be installed; no pretense is made that Overton or Martin or any other stockholder went to the foundry at El Paso to obtain time or credit. We pointed out that the peculations of Osborn had so depleted the company's treasury that in December, 1912, it did not have more than five or six thousand dollars. We pointed out that, indispensable as was the cyanide plant, the company had no fund with which to install it, nor did the stockholders ever contribute a single dollar for that purpose. We pointed out that this company in its own minutes confessed its financial inability to purchase Section 5, and we asked why, if Section 5 were so necessary to this company, and if it had either the cash or the credit with which to acquire that section, it so utterly failed to do so. We pointed out that in January, 1914, this company

was compelled to and did borrow $10,000 from the very man who is now being accused in this litigation. And we pointed out that so magnificent was the credit of this company that its San Francisco Bank refused to make necessary loans to it until the personal guaranty had been given of the very people that it is now claimed were looting and pillaging the company. These things cannot be fairly contested; they are writ large upon the face of this record; and we submit that when all of the facts and circumstances surrounding this company during 1912 and 1913 are considered, full justification will be found for the testimony of the director of the Marfa National Bank who declared that

> "in 1912, and the early part of 1913, I would not have loaned the Presidio Mining Company any money without additional security" (p. 904).

THE FINANCIAL POSITION OF WILLIAM S. NOYES IN 1912-13:

> **During the period of time relevant here, not only did Mr. Noyes have an account with his New York bankers and real estate in New York City, but his financial standing was such that he was able to acquire Section 5, obtain the credits which permitted the installation of an $80,000 cyanide plant, and be acceptable, with others, as a personal guarantor to a San Francisco bank of loans made by it to the Presidio Mining Company.**

At various places throughout his brief, the appellee favors us with his views as to the financial condition of Mr. Noyes during 1912-13. And perhaps as concrete an illustration as any of the position of the appellee upon this topic will be found on pages 106-7 of his brief in the sentence

> "his financial condition was such that it was an impossibility for him to borrow money on his own credit with

> which to either acquire Section 5 for himself or operate it after he had acquired the same";

and it is in this connection that the appellee, referring to an allegation in the answer of William S. Noyes makes the statement that "he had no ready money of his own in December, 1912" (page 106 of appellee's brief). With reference to this last statement, what was really said in Mr. Noyes' answer was the following:

> "This defendant denies that immediately prior to December, 1912, and during the period when he was securing an option to purchase said Section 5, and thereafter, during the period when he was paying for said property, that he was without means of his own to purchase said property; admits that at said time he was without ready money with which to purchase said property, and was compelled and did borrow the money required for said purchase, and this defendant further avers that he was not aided in the purchase of the capital stock of said Silver Hill Mill and Mining Company, financially or otherwise, by said Presidio Mining Company, or any of its directors. This defendant denies that he could not have obtained the funds with which to pay for said Section 5, except with his relation to said Presidio Mining Company;"

and in connection with this allegation, we wish to point out that what is there stated is in no way any impeachment of Mr. Noyes' financial condition at the time in question,—indeed, the Court of Appeals of New York recognized, what was not true of Mr. Noyes, that a man may even be "financially embarrassed" and still be possessed of abundant property (*Jacobs v. Morrison*, 136 N. Y. 101). And the ineptitude of this criticism of Mr. Noyes' financial position may be illustrated by the facts that not only did Mr. Noyes have money and stocks with Herzog and Glazier, the banking house in New York City, whose correspondent was J. Barth and Company,

of San Francisco, not only did he have real estate in New York City, and not only did he have stocks in other companies in California, but he had such an assured position that Mr. Cleveland was quite content to go upon his note to the Marfa National Bank for $10,000, and the El Paso Foundry Company and Gleim & Company, and others, were content to give credit to the Presidio Mining Company upon Mr. Noyes' assurances, but also, when the Presidio Mining Company was at its wit's end for money and credit, it was the Wells Fargo Nevada National Bank which made it loans *upon the faith of a guaranty signed by Mr. Noyes and others.* And not only was he in a position to obtain without difficulty the funds necessary for the purchase of Section 5, not only was he in a position to procure credits for a company itself without credit, but even after he had assisted the company by personally obligating himself to the Wells Fargo Nevada National Bank, he actually made a loan to the Presidio Mining Company of $10,000 in January, 1914. As illustrative at once of the financial position of Mr. Noyes and of the lack of credit of the Presidio Mining Company, reference may be made to the facts detailed in the following excerpt of the testimony of Mr. Noyes, facts which, knowing what we know of the history of this enterprise, are intrinsically reasonable, and facts which were subject to swift and easy contradiction if they had not been truthful:

> "Q. In regard to the conditions under which you entered into the agreement with the company in the manner that you have described, to divide the net profits, fifty-fifty, was there any statement or promise made by you that the company might at any time buy Section 5 when it was in

a financial position to do so, or wished to do so, or could do so?

A. I told them that many times in conversation; that was a part of the conversation that took place when this agreement was made between Mrs. Willis, Miss Doherty and Mr. Osborn. When I purchased Section 5 in the manner in which I have described, I had not any assurance from the Presidio Mining Company that it would take it off my hands at the price at which I bought it, or at any other price. When I returned here, after I had purchased the stock of the Silver Hill Mill and Mining Company, the Presidio Mining Company was not in a financial position to take it off of my hands. As to what was the credit of the Presidio Mining Company as far as its ability went to borrow money at that time, I only know as far as we made efforts; we could not get any money. We tried to borrow money from the Wells Fargo National Bank, with which we had done business for thirty years; they would not loan us any. When I did obtain a loan I got it from my friends in Texas on my assurance to them that the property would pull out and pay the loans. In regard to the loans for the Presidio Mining Company for which we applied to the Wells Fargo Nevada National Bank, and they declined to loan the company anything. Mr. Osborn made the application; he showed me their reply or wrote me their reply; and they would not loan over $2,500 which was worse than nothing to us at the time. Later on, I borrowed money on behalf of the Presidio Mining Company; we got a loan; I have forgotten how much it was; five or ten thousand dollars—I think it was $5,000; and as to the security given for that loan, Mrs. Willis, my brother, myself and Mr. Osborn, joined in a guaranty up to $10,000. As to the prevailing rate of interest for individual loans is ten per cent there now."

We submit that when all of the facts in this cause are considered, this court will have no more difficulty in acceding to the good financial position of William S. Noyes, than did Mr. Bowers, or the Marfa National Bank, or the Wells Fargo Nevada National Bank, or

any of the firms or corporations who assisted this company with credits upon their faith in the character and financial standing of William S. Noyes.

FAILURE OF APPELLEE TO TRACE FUNDS OF THE PRESIDIO MINING COMPANY INTO THE PURCHASE PRICE OF SECTION FIVE:

> **The conspicuous and complete failure of appellee to establish "that the notes themselves which he (Mr. Noyes) gave, from which these moneys were paid (as the purchase price of Section 5), were not paid until a year or a year and a half thereafter that particular period, and the moneys were taken from the corporation", illustrates the futility of appellee's "whole contention"; it is as true now as when the original bill came before Judge Dooling, that the appellee's case, to use Judge Dooling's language, "does not show that the property bought by defendant Noyes was so bought with the money of defendant Presidio Mining Company" (39).**

In our opening brief we discussed this matter at some length analyzing the facts and presenting the law as determined by the highest court in this country; and we are bold enough to believe that we succeeded in making it clear that none of the funds of the corporation to which the Marfa National Bank would loan no money without additional security, the corporation to which the Wells Fargo Nevada National Bank would loan no money without the personal guaranty of the very people now accused here of fraud, and the corporation which did not hesitate to accept a loan of $10,000 from the very man now accused of looting and pillaging its treasury, were ever traced into the purchase of Section 5; and the response made to this statement is such a nude and ineffectual assertion as, for example, at the foot

of page 145 of appellee's brief where it is said that the moneys of the corporation were ultimately used to repay the very notes given by William S. Noyes (page 145). No attempt is made to analyze the evidence. No attempt is made to collate the relevant authorities; no attempt is made to furnish any real or practical aid in resolving this issue; and all that we are confronted with is vain and empty assertion. Is it, or is it not the law, that the burden rested upon this appellee to establish that the moneys that paid off Mr. Noyes notes were moneys which were taken from the treasury of this treasureless company? Is it, or is it not the law, that in following trust funds, it is not enough that the appellee's evidence be consistent with the theory that Mr. Noyes purchased Section 5 with money taken from the company, but that evidence must also be inconsistent with the theory that the money that paid off these notes came from other sources? Is it, or is it not, the law that if this legal criterion be not satisfied, nothing is proved? And in making these inquiries, for the purpose of illustrating the paucity of this fallacious reply to our position as to this topic, we would not have it understood that there is anything in this record consistent with this appellee's claim; as the discussion in our opening brief will make clear, we repudiate the thought that any such evidence appears in this record. In point of fact, we are convinced that an assertion which fails to go further than mere conjectures, however frequently repeated, is of no assistance to a bench of judges anxious to do that which is right under the law, and desirous of assistance in the performance of that duty by the men at the bar; and speaking for ourselves, we do not think it fair to

hand up a mass of unsupported assertion barren of apt discussion of the facts or the law.

THE LEASE OF JANUARY 25, 1913, THE RESOLUTION OF FEBRUARY 15, 1913, AND THE FINAL CONTRACT OF NOVEMBER 19, 1913:

> These instruments must be considered in the light of the situation in which they were made; they were neither fraudulent in themselves nor productive of detriment to the company; the lease of January 25th, itself a temporary expedient, was so unfair to Mr. Noyes that by common consent it was superseded in ten months by the definitive agreement of November 19th; as to the resolution of February 15th, while Klink-Bean & Co. guardedly declare that "we are also under the impression that the undertaking by the company to pay $45,000 for securing the lease, was neither judicious nor equitable" (an "impression" upon a matter as to which different minds might well entertain different views), but further declare that "although the payment of $45,000 appears to us as excessive, the arrangement has, on the whole, resulted in a benefit to the company," and all this without imputation of fraud, yet the resolution expressly limits the "deferred payments" to "earnings", and the record shows that Mr. Noyes never received more than a fraction of the amount, of which fraction $10,689.75 were returned to the company; and as to the final agreement of November 19th, which definitely settled the rights of the parties in conformity with the general announcement made to all stockholders in the annual report of October 6th, Klink-Bean Co. not only describe that contract as fair, but also declare that it has been fairly carried out.

We find comparatively slight discussion of these three documents in the appellee's brief. The references to the lease of January 25th, are conspicuous for their sparsity. The references to the resolution of February 15, 1913, furnish another illustration of that unreliability which is so marked a feature of the appellee's brief; and the discussion of the final contract of November 19th,

is substantially nil. It is asserted on page 11, of the appellee's brief, that on November 19, 1913, Mr. Noyes "without notice" cancelled the original lease of January 23, 1913; but we do not understand such to be the fact. As we read this transcript, we see the contracting parties themselves coming together as to the final contract of November, 1913. We do not see anything to justify the imputation that it was Mr. Noyes who without notice cancelled that original lease. Of course, as we argued in our opening brief, and produced the facts in support thereof, this lease of January 25th, was undoubtedly most unfair to Mr. Noyes; it originated as a temporary expedient for the purpose of authorizing the company to enter Section 5, and operate there without being denounced as a trespasser, while awaiting until, at a convenient time, a definite agreement settling the rights of all concerned should be made; and this was done on November 19, 1913. Nowhere in this history can be found a fair basis for the claim that the cancellation of the lease was a unilateral act of Mr. Noyes, performed without regard to the rights of those concerned or the existing conditions; and to imply anything of this character is manifestly to distort the disclosures of this record. Just how the resolution of February 15, 1913, came to be adopted, and what was the temporary purpose which it was designed to subserve, are fully explained in the testimony in the cause; and with the terms of this resolution before him and with that testimony at hand, we are at a loss to appreciate how this appellee can make the claim, for example, which appears on page 55 of his brief, to the effect that this resolution "provided for an unconditional payment to him (Mr.

Noyes) of the said sum of $45,000 from the company treasury, and not from any profits from Section 5''. We insist that the suggestion of this appellee that the payment of Mr. Noyes' notes, given for the money borrowed to pay for Section 5, was assured under the terms of this resolution which provided for an unconditional payment to him of $45,000, is an unexcusable maltreatment of the terms of that resolution, and of the surrounding circumstances. No one knows the terms of that resolution better than the appellee. No one knows better than he that the resolution contains the condition that the money shall be paid only out of the earnings of the company; no one knows better than he that the reason for the installation of the new cyanide plant was the declining quality of the ore in Section 8 (670, 671, 687); and no one knows better than he that ore of a better quality was immediately required to turn into money to meet the obligations associated with the installation of the new cyanide plant. At the beginning of 1913, the ore from Section 5 was in fact of better grade than that from Section 8 (Klink Bean report, answer to defendant's suggestions 17 and 18 (985). And as a matter of history, between January, 1913, and December, 1915, the company made a profit of over $113,000 from Section 5 (Klink Bean report answer to defendant's suggestion 10 (983), while Section 8 lost money. In other words, as shown by the uncontradicted evidence, the promise to pay Mr. Noyes the $45,000 (a sum by the way which he never received), was hedged about with, and limited by the proviso that the money should be paid from profits only; and in the next place, every dollar that was ever paid him from first to last came

from profits derived from Section 5 ore, and from no other source. At page 766 of the record, the following occurred on cross-examination:

> "Q. You say that the Presidio Mining Company could not buy Section 5; is that a fact?
>
> A. It could not.
>
> Q. At the same time it has paid you $45,000?
>
> A. Out of ore that came out of Section 5, after it came out of Section 5 and had been reduced."

With what degree of patience, then, can a court listen to an accusation of fraud against Mr. Noyes by reason of the resolution of February 15, 1913, when this appellee himself actively seeks to impress upon the court the erroneous belief that the promise to pay Mr. Noyes this $45,000 was unconditional, appellee well knowing, all the while, that payments under the resolution were, by its very terms, to be made by profits only, and that every dollar that was paid to Mr. Noyes came, in fact, out of the profits derived from the ore which came from Section 5 (which section had been paid for from Mr. Noyes' money and from no other source)?

At page 179, after referring to the suggestion that the purchase of Section 5 was a speculative and hazardous enterprise, the question is asked, "if so, why pay $45,000 for a lease on the same"? That Section 5, like any other mining enterprise, was speculative and hazardous we believe, and in that belief we have this comfort that the Supreme Court of the United States, the Circuit Court of Appeals for the Eighth Circuit, and other courts agree with us. But the evidence shows that while Section 5, like any other mining venture, was conjectural in its ultimate results, yet a pocket of ore had been

located there by the Lewisohn engineers, to which pocket of ore we have hitherto in the course of this reply made reference. At this time, the Presidio Mining Company was carrying a heavy load; it was installing a new cyanide plant, at a cost in round numbers of $80,000; and to meet its obligations, it was necessary that adequate funds should be obtained, and obtained promptly. This was one of the reasons why the lease of January 25, 1913, acquired its importance; and this situation furnishes, without going further, at least one answer to the inquiry of the appellee in his brief. That answer is that it was to the last degree important to the Presidio Mining Company to procure from this pocket in Section 5 some of the $18.57 ore to add to its own $7.70 ore (985), so as to obtain the funds to meet its obligations incidental to the installation of the new cyanide plant; but in all this, it must never be forgotten that any payments made to Mr. Noyes under this resolution were to be payments arising from profits alone, and not otherwise; and therefore it must be plain, in view of the fact that the $7.70 ore of Section 8 was reduced at a cost of $9.51 per ton (985-982), that there could be no profit from there; and if Mr. Noyes did not get his payments out of the profit of Section 5, he would be wholly unable to get any profits at all, until, perhaps, the new cyanide plant should succeed in reducing the cost of production to such a point that the ores from Section 8 would produce a profit. And all of this was well known to the appellee, when he asked this question in his brief.

We find comparatively little comment in this brief upon the ultimate agreement of November 19, 1913; and

we are unable to perceive upon what theory this appellee could criticize the fairness of that contract. We have already, in our opening brief, pointed out the equitable considerations which make for the fairness of that contract; we have pointed out the judgment of the experts appointed by the learned judge of the court below, favoring the fairness of that contract; we have pointed out that in the management of his own farms by this very appellee, he employs precisely the same form of contract (608); and under all these conditions, we do not feel that the contract of November 19, 1913, requires any further defense from us.

THE METHOD OF ASSAYING:

The testimony of Mr. Noyes and Mr. Gleim upon this topic is more than confirmed by the disinterested report of the experts voluntarily appointed and highly commended by the learned judge of the court below.

Something is said in the appellee's brief concerning the method of assaying employed at the mine. At page 114 of appellee's brief, this method is unfortunate enough to be denounced "the pernicious system of false assaying"; at pages 174-176, after some arithmetic, it is stated that the system is wrong; and in connection with this criticism, reference is made to Mr. Lasky and his testimony is summed up in the vague and nebulous proposition that "he testified that the manner of assaying was not susceptible of accuracy". Kiffin, also, is mentioned in this connection, the same Kniffin who is himself a model of inaccuracy upon material matters. We think that any experienced judge of human testimony can hardly fail to read the testimony of these two

men without seeing that they were partisans; and in view of this, we may be pardoned if we prefer the disinterested statements of the Klink Bean report to their prejudiced views. It was a matter of no consequence whatever to Klink Bean and Company, appointees of the learned judge below, which side should prevail in this litigation; that company was highly commended as a firm of experts by the learned judge below, and described as fair-minded; and it was declared that their results were "very close and very correct". When, therefore, we contrast the complaints of this appellee concerning these assays and the mode of sampling at the mine with the results reached by the experts, there is practically nothing left to be said upon this topic. In their report, the experts state that the sampling is carried out in a systematic and practical manner and conforms to the terms of the contract; that the sampling from both mines is done in the same manner and method, and the adjustments made to both properties according to the mine assay percentage; and that over a long period the law of averages should tend to equalize results. They further state that for the purpose of ascertaining more accurate results of assays, weights and reconciling, it would be necessary to maintain an engineering and sampling force costing from five to six thousand dollars per year and increase the cost of mining by reason of separate handling, or build an automatic sampling and weighing plant at an approximate cost of $25,000. They then go into an examination of the mine assays of both Section 5 and Section 8 for the years 1913, 1914 and 1915; and the result was "slightly in favor of No. 8 under the present method". They

further say that not only was the contract of November 19, 1913, fair enough, but it has been fairly carried out; that the methods used for estimating tonnage are in accord with mining practice at similar mines; that the sampling is done in a systematic and practical manner and conforms to the terms of the contract, and that the assaying appartus is good, and the assaying is conducted in a regular, competent and systematic manner (Klink Bean report, *passim*). Here, then, we have the candid report of disinterested outsiders, appointed by the learned judge below, wholly non-partisan and fair-minded men whose results have been judicially commended as "very close and very correct" (964); and under such circumstances we think we may be pardoned if we prefer the conclusions reached by these gentlemen to those of either Lasky or Kniffin.

THE FLUCTUATIONS OF SECTIONS 8 AND 5:

The accidents of mining are ever present in the minds of all concerned in that industry; "everyone knows the business is of the most fluctuating and hazardous character" (Tuck v. Downing, 76 Ill. 71, 94; So. Dev. Co. v. Silva, 125 U. S. 247; Richardson v. Lowe, 149 Fed. 625, 634).

At page 173 of the appellee's brief, the following statement is made,

> "the Klink Bean schedules show that immediately upon his (Mr. Noyes) securing control, Section 8 ore values were forced down, and Section 5 tonnage forced up."

Taking this statement from the appellee's brief for once at its face value, and without stopping to analyze it with any degree of minuteness, does it follow that the depression of Section 8 ores and the elevation of Section

5 tonnage was due to any act upon the part of Mr. Noyes? Is not this a fair sample of the fallacy that we used to read of in our school days commonly known as *"post hoc, ergo propter hoc"*? Why should there be this continuous and unbroken straining after the imputation of dishonesty rather than the fair acceptance of a reasonable explanation consistent with honesty? Speaking upon this topic, Mr. B. S. Noyes remarks:

> "but about November, 1912, the average ore of the Presidio Mine dropped; that is to say, from that time on they got no more of this high-grade ore until lately, within the last six or eight months, since this suit was commenced, or perhaps at about the same time, I should say, speaking from recollection, three months after, we began to get better average assays, and this year within the last four months, the average assays of ore from Section 8 have greatly improved, while those of Section 5 have declined. I account for that by just the accidents of mining; that is always the case in a mine of that sort; the ore goes up and down; it always has done so. The average value of a ton of rock in 1911 and 1912, for example, according to my recollection was in the neighborhood of $10.00; that last two or three years, I think our rock has not averaged more than $7 for the three-year period; and if we had not cut the cost of mining from $9.50 to under $6 there would have been no Presidio Mining Company today" (page 1059).

And this testimony by Mr. Noyes reminds us of the following passage from the opinion of this court in *Cowell v. McMillin,* 177 Fed. 25:

> The fact that the defendant lime corporation apparently lost money between the years 1892 and 1897, and that the Staveless Barrel Company made money during that same time, would be significant if the facts or circumstances showed that the relation of one concern to the other was initiated in fraud, or, after being entered upon, became fraudulent in any way. But they do not. The lime company appears to have saved money in the item of barrels by its

agreement to buy them at 30 cents; and the evidence of its losses in its lime business during the particular years mentioned shows that general business depression obtained at that time and bore heavily upon most commercial enterprises. The general results of the investment to the stockholders in the defendant lime company for the 16 years between 1888 and 1903 show a profit of $290,000 on the original investment of $100,000 and a profit each and every year except during the years of business dullness above mentioned".

THE DOLLAR DIFFERENTIAL:

The allowance or disallowance of one dollar per ton was a matter of business judgment within the discretion of the directorate; no imputation of fraud in this connection can be justified; and the allowance was waived and discontinued by Mr. Noyes long before this controversy was precipitated.

The claim is made at page 176 of the appellee's brief that the dollar differential provided by the contract of November 19, 1913, is, like the methods of assaying in vogue at the time, "inherently wrong"; but since we have referred to this matter in our opening brief, we do not consider that any lengthy discussion is necessary here. Of course, the word "differential" is not used in the contract, the language of the contract being

> "from such gross value, the actual cost of mining and milling, less the sum of $1.00 per ton for the smaller cost of mining in said Silver Hill Mine as compared with the mine of the party of the second part, shall be deducted and the difference shall constitute the net value of the ores so taken during that period by party of the second part from said Silver Hill Mine";

and this, be it remembered, is the same contract which the Klink Bean Company report described as being fair, and as being fairly carried out. In that report, no claim

is made of any impropriety, in the sense of fraud, in the matter of this $1.00, the authors of the report stating merely that "we are of the opinion that the reduction of cost of mining of $1.00 was hardly fair in the circumstances". This, however, is far from being a condemnation of this item as savoring of fraud; and if the appellee can point out any evidence that "the actual cost of mining and milling" was not fairly calculated and ascertained in the light of the situation known to the directors at the time when this contract was entered into, or that from the figure so ascertained any greater sum than $1.00 per ton has been at any time deducted, he will have avoided arithmetical speculation and will at least have confined himself to the case as presented.

But, as we have already suggested, in such matters as the method of bullion apportionment, the dollar differential, the tramway commutation and the salaries, it is always to be remembered that these were all matters within the fair scope of the discretion of the board of directors; and it must also be borne in mind that in appraising their exercise of that discretion, it should, we think, be remembered that mere proof of what they did cannot condemn them without the further proof that what they did was wrong, and wrong in the sense that it was fraudulently injurious to the company. This suggestion is, we venture to think, in line with the suggestions of Mr. Justice Harlan in *Jessup v. Ill. Cent. Ry.,* 43 Fed. 483, and those of this court in *Cowell v. McMillin,* 177 Fed. 25. It may, perhaps, not inappropriately be added that primitive law regarded the word and act only of the individual, but did not search his

heart. "The thought of man shall not be tried", said Brian, C. J., one of the best of the medieval lawyers, "for the devil himself knoweth not the thought of man" (Year Book, 7 Edw. IV, f. 2, p. 2); and as a consequence, primitive law was formal and unmoral. But this primitive law has been radically transformed; the primitive law asked simply whether the defendant did the physical act which damaged the plaintiff; the law of today inquires further, whether the act was blameworthy; and the ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril.

COMPANY MANAGEMENT:

Criticism of the company management and of the constructive efforts of other men, especially if prompted by the selfish motives of those who failed to assist during times of stress, vanishes when all of the surrounding circumstances are adequately appraised.

Between pages 166 and the upper half of 168, a number of statements are made by the appellee, having to do more or less with the management of the company, which indicate marked misapprehension—to use no harsher term—of the contents of the record before us. For example, the statement is made that in January, 1913, "expenses began to pile up because of arrangements to operate Section 5"; but can it be possible that this appellee forgets that the record teems with evidence that the new constructions began in that month, and that the new cyanide plant began its operations in the following August, the old plant continuing work for a time while the new one was under construction? It seems scarcely necessary to argue that a reconstruction period always involves increased expense,

but the evidence here establishes no connecting link between the increased expense incident to the reconstruction of the plant, and the "arrangements to operate Section 5". In the same breath, referring to the profit of $23,379.33 from January to April, 1913, it is asserted that "this sum was nearly sufficient to pay for Section 5, had the company been allowed to do so". But, we submit, that, having in mind the general tenor of the appellee's brief, it is impossible to believe that he forgot the Osborn shortage, or the obligations created by the installation of the new cyanide plant; and this sum of $23,379.33, mentioned by the appellee, would certainly have had much more wonderfully expansive properties than even the widow's cruse of oil if it could have been made to pay the Osborn shortage of $10,689.75, the purchase price of Section 5, amounting in round numbers to $25,000, and the immediately due and payable obligations of the new cyanide plant amounting to about $40,000 (the remainder being deferred). And in this connection it may be added that it is generally considered among business men—a view in which the courts, as we have seen, coincide,—that the profits of a mining venture are neither so certain nor unfailing that obligations can be or are assumed in advance upon the strength of them. Again on page 167, the suggestion is made that if Section 5 "was a good purchase for Mr. Noyes, it was a good purchase for the company", and that "it would have been just as easy to have acquired the loans for the corporation", but as our references to such cases as *Lagarde v. Anniston Lime Co.*, 23 So. (Ala.) 199; and *Teller v. Tonopah Ry.*, 155 ~~id.~~ Fed

482, will show, assuming that if Section 5 were a good purchase for Mr. Noyes it was a good purchase for the company, that would be no reason why Mr. Noyes should have personally purchased that section for the company; and since the company had neither right, title, interest, estate or expectancy in the section, it had no equity to expect that Mr. Noyes should pledge his personal credit for its benefit. No doubt, it would have been, physically, quite easy for Mr. Cleveland to have put his name upon the company's note, but we apprehend that if Mr. Cleveland were asked to do that act, he would certainly have had something emphatic to say upon the subject, and his testimony leaves no doubt whatever as to what he would have said; and as to the Wells Fargo Nevada National Bank, that bank flatly refused to loan the company necessary moneys until the repayment thereof was guaranteed by the very same looters, wreckers and pillagers, who, appellee says, had no credit. And finally, before leaving this portion of appellee's brief, we call attention to the statement on page 168, that "in November, 1912, Noyes suddenly decided a cyanide plant was a necessity", and the only comment which we think it necessary to make upon this remarkable statement is this, that it is fortunate for these defendants that this court has before it a record which shows, upon the one side, a sincere and earnest effort upon the part of Mr. Noyes, running as far back as 1907, to benefit this company by the installation of a cyanide plant, and, upon the other side, a corresponding indifference, disregard, unwillingness and apathy upon the part of the stockholders, including the present appellee and the donor of his stock.

FALSE RECORDS AND CONCEALMENT:

Neither of these extravagant accusations is sustained by the record.

Much has been said in the course of appellee's brief upon these topics. Insofar as the alleged falsity of the corporate records is concerned, the principal cause of complaint appears to be, insofar as one may judge from pages 8, 123 and 158 of appellee's brief, that the recitals in the minutes do not concur with the three-year-old unassisted recollection of two uninterested dummy directors. We have gone over this matter in our opening brief fairly fully (320-328), and need not renew that discussion in this place. Plainly, even if we should assume any irregularity in these minutes, that irregularity had nothing whatever to do with the resolution of February 15, 1913, or the ultimate contract of November 19, 1913; and not only had that nothing to do with the lease of January 25, 1913, but Gardiner himself makes no pretense that any irregularity occurred affecting that lease and concedes that it was he himself who moved the adoption of the lease by the company. And since no showing has ever been made that the adoption of this lease operated any detriment whatever to this corporation, since the reverse was the case and the lease was grossly unfair to Mr. Noyes as the owner of Section 5, we are somewhat at a loss to understand why, assuming any collateral irregularity at all, time should be wasted in discussing the same.

In January, 1913, Mr. Noyes had not as yet acquired all of the stock of the Silver Hill Company, nor had he received as yet any deed to Section 5. On January 25,

1913, although the Osborn shortage had only just been discovered, yet Mr. Noyes had not as yet returned from Texas and had not as yet taken up that unpleasant subject with the principal stockholders in the company; in January, 1913, at the meeting in question, no occasion arose which then called for any statement either as to Mr. Noyes' efforts to obtain Section 5 (then well-known to the principal stockholders), or as to the Osborn shortage then only just discovered; and in January, 1913, no payments had as yet been made by Mr. Noyes upon any of the obligations which procured him the funds with which to purchase Section 5. It appears, moreover, that at this meeting, a loan of $15,000 for company purposes was authorized; it nowhere appears that this money was ever procured by the company; it nowhere appears that this money was ever procured by the company upon its own credit; it nowhere appears that if this money were obtained it was not used in the betterment of the company; and it nowhere appears that any alleged irregularity at the meeting affected this loan any more than it affected the lease of January 25, 1913. The claim of the appellee as to these pretended irregularities does not, in our opinion, arise to the dignity of a tempest in a tea pot.

There are remarks scattered through the appellee's brief upon the subject of what it pleases the appellee to describe as "concealment". It is difficult, we must confess, to extract from this brief a reasonably clear conception of precisely what is intended by appellee's remarks in this connection. For example, on page 14, the extravagant statement is made that "all annual re-

ports had concealed from the stockholders what the defendants now claim was the true condition of the company"; these reports, however, are contained in the volume of exhibits, and speak for themselves; and it would be, we think, very much more to the point if the appellee had taken the trouble to specify what particular subject-matter, relevant to the issues in this cause, had been concealed. And when the appellee, in the passage quoted, undertakes to speak about "the stockholders", it is perfectly obvious that what he has reference to is not the general body of the stockholders at all, not even the dummy co-complainant, Martin, who has never manifested the slightest interest in, or regard for, the affairs of the company, but the single individual who got his stock from a man who had "lost confidence" in the Presidio Mine, who desired to evade corporate liability, and who is not shown to have received a single penny for the stock which he unloaded upon others, and a single individual whose apathetic disregard for the company, its fortunes and its affairs, was so marked that he had even forgotten what stock "our family owned".

From the first disclosure of this record to the last, Overton aside, no voice whatever has been raised to claim any improper concealment by the defendants of any fact which the stockholders generally should have known. So far as the transfer of the Boyd stock from Osborn to Mr. Noyes is concerned, that, as we have already developed in our opening brief, was not a matter in which either the corporation or any of its stockholders, or the complainant here, had any legal inter-

est or concern; and if Mr. Noyes controlled Osborn through his antecedent knowledge of Osborn's defalcations—if, as this appellee declares, "Osborn was fearful of a disclosure of his crime" (brief, page 157),—it would plainly not have been necessary for Osborn to have made the transfer at all to Mr. Noyes, because, under these hypothetically assumed conditions, Mr. Osborn would have been in the hands of Mr. Noyes the same "pliant tool" that the appellee claims Miss Doherty to have been; and indeed, in passing, it may be observed that in the disordered imagination of this appellee, and for one reason or another, every human being with whom Mr. Noyes came into contact immediately lost his individuality, fell under the sinister control of Mr. Noyes and became his pliant chattel. Osborn was subservient to Mr. Noyes because "fearful of a disclosure of his crime"; no man could lend Mr. Noyes a dollar without being improperly influenced to do so; Mrs. Willis was misled; Miss Doherty was a pliant tool; and "E. M. Gleim, the superintendent, was at all times under the control of William S. Noyes" (191); and the very statement of these things, especially in view of the failures of Mr. Noyes to persuade these people to join any projects for the betterment of the company, sufficiently refutes them as the morbid imaginings of this solitary complainant. And so far as the acquisition of Section 5 is concerned, we submit that where a transaction of that kind is preceded by an effort on the part of the purchaser to have the company itself acquire the section; where upon failure of the principal stockholders to accede to a purchase by

the company, the purchaser openly declares his intention to acquire the section for himself; where the section is acquired in the most open and public manner; where dealings ensue between the company and the purchaser with reference to the section in which all concerned knew the purchaser as the real owner of the section in question; where after the purchase was made the owner offers the section to the company at its cost to him, but the company declines the offer because of financial inability; where the records and minutes of the company contain repeated references to the purchaser as the owner of the section; where the company's annual report tells the whole story to every stockholder; and where there is no proof that any stockholder actually did not know the circumstances themselves, no one can say, with the slightest degree of seriousness, that such a transaction, given such publicity, was concealed —to say that it was concealed is to twist and distort the English tongue out of its normal identity.

But at sundry places in the appellee's brief, reference is made to certain letters or telegrams; on page 137, it is declared that "all have been destroyed or removed"; on page 157, it is asked, "why necessary to destroy these telegrams?"; on page 160, after referring to an item of $22.05 for telegrams, it is asserted that "all these telegrams and all correspondence covering this period are destroyed"; and on page 215, reference is made to "the disappearance of all the telegrams and letters pertaining to the transactions had between William S. Noyes and this company, its officers, and his brother, in December, 1912, and January 1913". And

in connection with this last reference, the appellee refers to page 34 of the appendix to his brief, where a letter is found addressed by Constance Mills Overton to the president of the Presidio Mining Company, containing extracts from letters of Mr. Noyes and of Mr. Gleim, with marginal comments thereon by Mr. Noyes; these marginal comments speak for themselves; and no proof which we are able to recall was made in this cause to impeach the verity of any one of them. In some instances, the matters involved were purely private; in other instances, the letters were not kept because too old; in other instances, there was no copy; and Mr. Noyes' methods of handling his correspondence, and especially correspondence itself about three years old when this litigation was commenced, is fully described on pages 783-784 of the record. And in connection with this subject-matter, the appellee undertakes to formulate what he "believes" as to the contents of these telegrams; but what has his belief to do here? Is this case to be decided upon the actual facts proven in this record, or upon the beliefs of the parties litigant? Of what assistance is it to this court for one litigant dogmatically to assert a belief of his, and for the opposing litigant, with equal dogmatism, to assert a contrary belief of his? What canon of professional ethics justifies such a course as this?

No doubt, the imputation sought to be conveyed by these references to the destruction of these letters or telegrams is that in them was contained something sinister, though what that was no effort whatever was made to establish. The inquiry on page 157, "Why nec-

essary to destroy these telegrams?", sufficiently indicates this unfortunate mental attitude of morbid suspicion and of persistent antagonism to the precept that men are to be presumed honest rather than dishonest; and, as just remarked, the attitude was one of purely baseless suspicion, because no effort whatever was made to show that there was anything improper in the documents referred to. And upon the assumption that these documents were destroyed, we think that there is some difference between the case where a man, after the occasion has passed, does, as a matter of habitual system, destroy communications rather than have them accumulate and the case of a man who destroys a document to cover up some wrongdoing of which he has been guilty; and insofar as this record traces any documents to Mr. Noyes, he has explained fully and completely, and entirely without contradiction, his method and system in disposing of papers, declaring *inter alia,* that "my files would crowd me out of office, if I kept everything of that kind after matters were settled" (784). But where is the proof that the telegrams in question were "destroyed"? There was some slight evidence that they could not be found, but while a failure to find them might be chargeable as a piece of mismanagement against a clerk or secretary, it could scarcely be charged as against Mr. Noyes, who performed no functions of that character. There was, as we know, a telegram from Mr. Noyes in Texas to Mr. B. S. Noyes in California, and a reply from Mr. B. S. Noyes to his brother having to do with the Osborn shortage, and there was either a letter or a telegram from Mr. Noyes in Texas

to his brother in California requesting him to bring the lease of January 25, 1913, to the secretary's office, so that it might be executed; but at this time, Mr. B. S. Noyes was not an officer of the company, or connected with it in any way; and we do not believe that private communications between him and his brother had any place whatever in the company files; and even if they did, there was nothing whatever in these communications of a sinister character, or which operated any wrong or detriment to this complainant or the corporation. And moreover, and in addition to what has just been said, we find that the pages of the record referred to by the appellee in support of his statement that the telegrams were "destroyed" wholly fail, as usual, to support the statement which he makes. These telegrams appear to have first been inquired about when Mr. Peat was upon the witness stand. At that time, his attention was called to a bill dealing with twenty-two telegrams amounting to $22.05. The voucher was numbered 19 and dated February 12, 1913, and it referred to the twenty-two telegrams as of February, 1912, about a year previous, and included two other items (522). When the voucher was presented, the learned judge below, referring to the telegrams, asked, "What are they?" and in response to that, the appellee, through his solicitor, stated, "It does not specify what they are. They are telegrams that we claim were sent from Shafter, Texas, to W. S. Noyes and we will connect them up later."

With reference to this incident, we beg to observe that no explanation was made of the difference of one

year between the time when the telegrams are said to have passed and the date of the voucher; nor is any explanation made as to why Mr. Noyes who receipts for the $22.05 should pay for telegrams sent to himself; nor is it explained by whom these telegrams "were sent from Shafter, Texas, to W. S. Noyes"; nor is any explanation made as to what their contents were; and although the appellee declared that "we will connect them up later", yet, if by "connect up" some relationship between the contents of these telegrams and the issues in the cause be understood, this promise never was kept, and never was kept whatever meaning be attached to the phrase "connect up". And when the defendants' solicitor objected to these telegrams, the learned judge below allowed them to go in "subject to being connected up" and declared that if the connection were not made, they would be stricken out.

Thereafter, the witness Mr. Peat, then a witness for the complainant below, declared that

> "there are telegrams in the office, but I cannot say how far the dates of those telegrams go; there are some there. I will look and see and produce them for you to look over" (524).

Subsequently, Mr. Peat was recalled as a witness upon behalf of the complainants, and on that occasion, the following occurred:

> "I recollect that you asked me the other day if there were any telegrams in the office of the company relative to the purchase of Section 5, as having been received and sent relative to company matters in the month of December, 1912, and January, 1913; I have made a search of the records relative to this matter and these telegrams; I did not run across any such telegrams in the office.

Q. What is the earliest date, or rather the last date, since there are any telegrams of record in the office of the company?

A. I could not say as to the date. I have got a pile of them there.

Q. Did you not tell me it was 1914 or 1915?

A. 1915—there is quite a pile. I would not say there are none prior to 1915. None prior to 1914. I do not think there are any in 1914. I will say there are none prior to 1914 that I ran across.

Mr. ROSE. That is all.

The COURT. Do you rest?

Mr. ROSE. We rest''. (649).

Here, it will be observed that the complainant rested his case; but up to this point in the development of the litigation, not only was this alleged ''destruction'' not established, but it was not even determined by whom the telegrams were sent or what their contents were, except that instead of being telegrams sent by Mr. Noyes, they were telegrams sent to Mr. Noyes. Being telegrams sent to Mr. Noyes, not only was no proof made of their contents, but no proof was made that they were actually received by Mr. Noyes, or that Mr. Noyes ever replied to them or confirmed or ratified them in any way, or acquiesced in the contents of any of them; and we understand the law to be that before a message sent to a person can be utilized in a controversy to which he is a party, there must be not only evidence that he actually received the message, but also proof of confirmation, ratification or acquiescence in its contents. The voucher introduced by the appellee, and above referred to, refers, according to appellee's explanation, to telegrams sent to Mr. Noyes, but no attempt was made to produce or to account for the ab-

sence of, any reply to those telegrams; and we understand the law to be that the omission to reply is no admission of the truth of any matters stated in the message, even in cases where the contents of the message are disclosed; and that a telegram unanswered or unacted upon is not admissible either as *res gestae* or as implied admission of its contents *(Jones, Evidence,* Section 269, page 336; *Packer vs. U. S.,* 106 Fed. 906; *Marshall vs. U. S.,* 197 id. 511). Of what significance, then, is this entire telegram incident?

But another page of the record is referred to by the appellee, namely, page 746, and when we turn to that page, we find nothing there justifying any claim of wilful destruction, with sinister purpose, of letters or other documents. The testimony there given was that of Mr. Noyes on cross-examination, and it is purely negative:

"Q. I direct your attention now to the time of your negotiating for this Section 5 in 1912 and January, 1913, particularly December of 1912 and January, 1913. You have no telegrams or letters or communications between yourself and your brother which were sent and received between yourself and your brother relative to this Section 5?

A. No, I have not.

Q. There are none in the corporation files, either?

A. No, sir.

Q. The only letter we have here is this so-called Willis letter that you wrote to Mrs. Willis and which has been introduced in evidence.

A. Yes.

The COURT. Q. Have you got the letter in which you sent the lease up to your brother?

A. No.

Q. With instructions?

A. No, I never keep personal letters.

Q. That related to a company matter.

A. No, I simply asked him to take that up to the secretary and go and get it executed, and I am not certain whether that was a letter or a telegram of this date. I merely asked him to act as a messenger to take that to the company's office'' (746-747).

So far as this matter of alleged destruction is concerned, the foregoing are all of the pages referred to by the appellee in support of his assertion; and we venture the suggestion that nothing therein contained establishes that assertion, and still less establishes any destruction of any document in any effort to cover up or conceal any fact whatever.

It is in this connection that on page 146 of his brief, the appellee, speaking of the acquisition of Section 5, observes that ''No large stockholder, other than these two, Osborn and Mrs. Willis were approached on the subject, but active concealment took the place of that frankness and openness required under the law touching these transactions''; but in view of the extent of the holdings of these two stockholders, one naturally inquires as to what other ''large stockholder'' there was with whom Mr. Noyes could confer? Certainly, it would have been idle for him to seek to communicate with Anson Mills, who had long before ''lost confidence'' in the Presidio Mine, and who had long before given away his stock under the dread of being compelled to respond to corporate liability. Equally fruitless would it have been for Mr. Noyes to have hunted up any of those to whom Mills had transferred his stock, assuming any of them to have been ''large stockholders'', and assuming further that any of them

had retained either confidence in the mine or interest in its affairs. And when the appellee speaks here of "active concealment", all that he means is that *he* was not notified in advance of Mr. Noyes' intention, after having failed to induce the principal stockholders to purchase Section 5, to purchase that section himself; and it is wholly irrational to suppose that the donee of the author of the Mills correspondence, who had never manifested any interest in the affairs of this company up to this time and who doubtless inherited Mills' attitude of lost confidence with the Mills' stock, would himself have succeeded where Mr. Noyes failed in inducing the company to purchase the section, or would himself have joined with Mr. Noyes in that purchase, or would have purchased the section in his own name.

We have heretofore fully discussed the perfect openness of Mr. Noyes' conduct in connection with the acquisition of this section, both before and after acquiring it, and we submit that this conduct was characterized in a most marked degree by the very openness and frankness which the appellee asserts was absent from it. But in the passage in question, the appellee speaks of "that frankness and openness required under the law touching these transactions"—touching what transactions?

The company never purchased Section 5, although urged to do so by Mr. Noyes; oppressed by adverse conditions, burdened with debt, and with a depleted treasury, the company was quite without financial ability to purchase the section, and said so; the company

had never deputed Mr. Noyes as its agent to purchase Section 5; the company continued, during the Winter of 1912-13, the same policy of disregard for Section 5 which had marked its course of conduct from 1897 to 1912; and in no way was the company a participant in the transaction of the acquisition of Section 5; on the contrary, that transaction was a transaction without the scope of the company's business, to which it was not a party, and which took place between Mr. Noyes, the individual, and the Silver Hill Company, the stranger. Under what obligation, to repeat an inquiry which we made in our opening brief, was Mr. Noyes to disclose to an absentee stockholder of the Presidio Mining Company, like this appellee, the details of his private transactions with strangers? What duty, legal, moral or otherwise, was he under to this absentee in this foreign transaction that he should consult the absentee? The transaction between Mr. Noyes and the Silver Hill Company was not one in which the absentee had any concern, or as to which Mr. Noyes owed any duty to him.

In line with the appellee's unsupported claims of concealment, he attempts, at page 169, to start a back-fire by charging the appellants with suppressing and substituting figures to support a point made in our opening brief at pages 88-89. It is to be observed that the subject under discussion by us at that page was "the financial resources of the company available toward the installation of this cyanide plant as of January 1, 1913"; and we there quoted the Klink, Bean and

Company schedule 15 as authority for the following table:

Nov. 30, 1912—Cash in bank	$ 8,380.91
Bullion in transit	10,605.03
Drafts (accidentally omitted)	450.00
Total (not printed)	$19,435.94
Less mine overdraft, unpaid invoices	11,612.44
Net	$ 7,823.50

Since, however, the appellee complains of substitution and suppression, we take the liberty of referring to Klink, Bean and Company's schedule 15, printed on page 19 of the Appendix to appellee's brief, and from that source we extract the following figures:

Assets stated by us as above	$19,435.94
Assets claimed to have been "suppressed" by us:	
1. Mill Supplies	19,314.71
2. Mine Supplies	1,079.41
3. Fuel Oil	2,060.52
4. Fuel: Wood	297.51
5. L. Osborn	10,689.75
Total Assets	$52,877.84

Bearing in mind, then, the topic which we were discussing at pages 88-89 of our brief, we think that the least that this appellee could have done was to have pointed out which of the so-called "suppressed" assets (which we have numbered above from 1 to 5) was

"available toward the installation of this cyanide plant"? We submit that it is grossly unreasonable to expect that the Presidio Mining Company could pay bills for machinery, skilled labor, unskilled labor, materials, etc., with either mill supplies, mine supplies, fuel oil, wood fuel, or a claim against L. Osborn for misappropriated money; but until this is made clear, we do not conceive that any further comment upon appellee's remarks is called for.

The case of *Strong v. Repide,* 213 U. S. 419, is readily distinguishable upon the facts from the cause at bar. In that case, there was affirmative and active concealment of material matters, while inducing the execution of a contract of sale. The defendant was a director in the corporation and owner of three-fourths of its entire capital stock, and he was also the administrator-general of the company. He was engaged in negotiations that finally led to the sale of the company's lands to the Philippine Islands Government at a price which greatly enhanced the value of the stock; and in purchasing the stock of the plaintiffs, he employed another person to make the purchase and concealed his own identity as the purchaser, and concealed his knowledge of the state of the negotiations with the Philippine Islands Government, and concealed their probable successful result; and the case was further complicated by a claim on the part of the plaintiff that the person who purported to act as her agent was not authorized to dispose of her stock. The court did not overlook the proposition that the ordinary relations between directors and shareholders were not fiduciary, but took the

ground that "yet there are cases where, by reason of the special facts, such attitude exists". The court then went into the facts and pointed out that really the defendant was acting as agent for the stockholders in the negotiations for the sale of the whole of the property of the company, and that therefore when he employed a third person to purchase the stock, and indulged in the acts of affirmative concealment which have been mentioned, he failed to live up to the duties of his agency, and violated his legal obligations. Upon the facts, we submit that there is no parallelism between that case and the cause at bar, where, as we have seen all of the acts of Mr. Noyes relative to Section 5, both before and after its acquisition, were the perfectly open, public and unconcealed acts of an individual treating with a stranger in his individual capacity, and not as agent for any other person or corporation.

LACHES:

> **No excuse is offered to explain the unpardonable laches of this appellee; on the contrary, he denies that he was guilty of laches; and than this, "there is no class of cases in which the doctrine of laches has been more relentlessly enforced" (Patterson v. Hewitt, 195 U. S. 309, 321).**

We have fully discussed this subject in our opening brief, and should not have again recurred to it if it had not been that in his brief the appellee makes a statement which, in our opinion, like many other statements in the brief, is at variance with the facts. At page 41, it is stated that the pleadings, which are verified by the appellee

"show that in March, 1915, appellees first learned of and became suspicious of transactions occurring subsequent to December, 1912, in the company's affairs".

Although the plural "appellees" is here used, yet it is used entirely without authority, for the obvious reason that there is no proof in this record that in March, 1915, or at any other time, the nominal complainant Martin ever learned or became suspicious of any transactions whatever in the company's affairs; and consequently, this passage must be limited to the appellee, Overton, only. Again, it is asserted at the bottom of page 222 of the appellee's brief that "the discovery of irregularities" was made "on or about the first of April", which would be the first of April, 1915; and finally, on page 223 of the appellee's brief, it is stated that "in the instant suit it develops that Captain Overton first became suspicious about the first of April, 1915." Are these statements true? Is it the truth that Overton "first became suspicious about the first of April, 1915"?

We know that the annual report of 1913 was dated October 6, 1913, (Exhibit 17, book of exhibits page 26), and there is no denial that in due course of mail it was received by Overton. The only conclusion possible from the record before us is that between the time of the receipt of this exhibit by Overton in October, 1913, and the time when it was produced from his possession and put in evidence upon the trial below as complainant's Exhibit 17, the document remained in the possession of the complainant; certainly, there is not a syllable of evidence to show that during all that time it

ever escaped from his possession. After it was offered and received in evidence upon the trial below, the document passed into the possession of the clerk of the court below, in whose possession it has since remained, unless transmitted by him to this court; at all events, after this report was produced and received in evidence upon the trial below, it has remained in possession of a properly authorized officer of either the court below or this court. Not only is there in this record not the faintest trace of any alteration of this exhibit after it passed out of the possession of the appellee and into the possession of the proper governmental officer, but, since any alteration of this exhibit after it came into the possession of such governmental officer would have been a serious crime (Penal Laws, Sections 128, 129; 7 Fed. Stats. Ann. Second Ed., pp. 684-686), it follows that no presumption, even, can arise of any alteration of this exhibit after it left the possession of the appellee. In other words, this exhibit as it stands now in the book of exhibits provided for by the stipulation of the parties in this action (1201) is in the same condition in which it was when it left the possession of the appellee.

But, in the endeavor to escape the accusation of laches in this cause, this appellee takes the ground that he "first became suspicious about the first of April, 1915" (223), and that he had "full confidence in William S. Noyes up to the time of the discovery of irregularities on or about the first of April" (222); and he asserts that in March, 1915, appellees first learned of and became suspicious of transactions occurring subsequent to December, 1912, in the company's affairs (41).

Bearing in mind that Exhibit No. 17, had undergone no change or alteration since it left the possession of this appellee, are these statements true? We think that they are not true, and that the appellee herein is convicted by his own handwriting of untruth in these particulars. It will be remembered that in the annual report of 1913, a statement is made concerning the acquisition of Section 5 by Mr. Noyes, and the arrangement which he made with the company as to its being worked on terms of a division of the net; and we direct the court's attention to the fact that upon the margin of this report (page 29 of Volume of Exhibits), and opposite the passage dealing with the acquisition of Section 5, just referred to, the following words appear in the handwriting of this appellee: "This looks bad to me". Of course, there is nothing upon the face of this report to show affirmatively when this notation was placed upon the report by the appellee; no proof upon the subject was tendered during the trial below; and it can only be by a consideration of what is usual among mankind that any inference can be drawn as to the specific date when the appellee made this notation. The Code of Evidence of the State of California, which translates into general statutory rules many of the doctrines of the general law of evidence, permits an inference to be founded on such a deduction from a fact logically proved as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature (Code Civil Procedure, Section 1960); and the

code also provides for sundry other presumptions which it declares are satisfactory if uncontradicted, among which may be mentioned the presumption that a person takes ordinary care of his own concerns, that higher evidence will be adverse from inferior being produced, that the ordinary course of business has been followed, that things have happened according to the ordinary course of nature and the ordinary habits of life (C. C. P., Section 1963, sub-div. 4, 5, 20, 28); and it is also provided by subdivisions 6 and 7 of Section 2061 of the same code that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. In this connection we submit that it should be borne in mind that this appellee understood perfectly well, as his amended bill shows (71), that the defense of laches would be interposed in this cause; and therefore he understood perfectly well that the point of time when his suspicions were first aroused, as he puts it, might become of importance. If his suspicions were aroused by the contents of the annual report of 1913, then, since that report had been continuously in his own possession since its receipt, he had it in his power to explain, if he could, just when this notation was placed upon the margin of the report; and since he has failed to make that explanation, we believe that the natural presumption would be that he

made the notation at the time when he originally received and read the report, such being the natural and ordinary course of things. Certainly the notation on this report will not be pretended to be in the handwriting of Mr. Noyes or any other person except this appellee; it is entirely obvious that the notation was placed upon the document after its issuance from the office of the Presidio Mining Company; and since the appellee produced that document from his own possession as his own exhibit, Section 1982 of the California Code of Evidence would call upon him to account for the alteration; and taking together all that appears from the record upon this topic, we think, and submit to the favorable consideration of this court, that, as appears from this notation, the suspicions of this appellee did not become aroused on April 1, 1915, but became aroused in October, 1913, when he received the annual report. And in any event, whether annotated by him then or not, that report was such notice to him of all the facts connected with the acquisition of Section 5, that it no longer lies upon his lips to claim that he had not in 1913, notice of facts sufficient to spur him into activity and diligence if he would avoid the defense of laches.

The circumstance that the appellee's suspicions were aroused, not on April 1, 1915, but upon receipt of the report in October, 1913, very naturally directs one's attention to the language of the report, declaring that "this company will work it (Section 5) on terms of a division of the net"; and the natural inquiry presents itself as to why this appellee did not act promptly when

his suspicions were aroused? Since he made the above-mentioned notation, and since his suspicions were aroused upon receipt of a report which made the announcement as to the future that the company "will work" Section 5 on terms of a division of the net, he had at least a month before him within which to verify or dissipate his suspicions; and if he had acted promptly upon receipt of the report, he would have had ample time within which to ventilate or remove any grievance that he may have suspected himself to have had, before the final contract of November 19, 1913, was executed; why, then, did he not exercise the prompt diligence called for by the law and demanded by his suspicions, instead of, as we have elsewhere said, rolling over to continue his sleep of the past five or six years?

FURTHER CRITICISMS UPON APPELLEE'S BRIEF:

> **Generally speaking, no man who has the least knowledge of the actual disclosures of this record, can possibly be convinced, though he may perhaps be bewildered, by the inept claims put forward by appellee, whose mind, as disclosed in these claims, suggests a deserted derelict, without rudder, compass or guiding hand, drifting aimlessly about in the uncharted sea of imagination.**

The brief before us would not be the brief of this appellee if it did not reiterate the appellee's claims as to Mr. Noyes' "domination" over this company, its officers and its stockholders; but we take the liberty of referring the court to what we have said upon that topic in our opening brief. That there is no foundation in the evidence for the claims of the appellee in this regard, is not surprising, because, as this brief indicates, the cir-

cumstance that a fact, or a series of facts, may be irreconcilable with a claim put forward by this appellee, is usually, in his opinion, his strongest reason for adhering to such claim. And it was in connection with this sweeping charge of "domination", and as instructed by *Cowell v. McMillin,* 177 Fed. 25, that we discussed the facts of the relationship between Mr. Noyes and Mrs. Willis, and we submit that those facts quite fail to exhibit any "domination" by Mr. Noyes of this lady.

At sundry places throughout the appellee's brief (pages 100-1; 105-6; 159; 182-4), the statement is made that Mr. Noyes made secret and concealed profits through contractual relations between the Presidio Mining Company and third persons; that statement is, however, without support in the record; and the evidence establishes that no profits were made by Mr. Noyes whatever in business wherein the company had contractual relations (730, 928). It is quite untrue, as asserted on page 105, for example, that Mr. Gleim paid Mr. Noyes monthly commissions for the business secured from the corporation employees, the fact being that the only moneys paid by Mr. Gleim to Mr. Noyes were in the nature of compensation for his services, not for securing business, but for collecting bills; and the uncontradicted evidence is that the employees of the Presidio Mining Company were free to trade with whom they pleased, and where they pleased. Indeed, the appellee's position involves two assumptions, at least, neither of which is maintainable. The first of these is that any compensation which Mr. Noyes may have received in the course of matters with which the company was dis-

connected was a secret or concealed profit; but this assumption is contradicted by the circumstance that nowhere in this record can be discerned any concealment or secrecy, or any effort at concealment or secrecy, in any of these transactions. And the second of these unmaintainable assumptions is that a corporation employee cannot engage in an outside enterprise in which no showing is made that the corporation is itself interested, but the reverse; and this topic has been fully discussed in our opening brief in this cause. Obviously, after having paid off its men, the Presidio Mining Company had no interest in how those men should dispose of the wages earned and paid to them, whether for board, groceries, clothing or what not; the only concern of the company was in paying its employees the wages due them; and with the subsequent movement of those wages, the company was not connected, and had nothing whatever to do.

In this connection, moreover, a brief reference may be made to page 182 of the appellee's brief, wherein it is asserted that after Mr. Noyes had stated that his business interests had ceased in the nineties, he changed his testimony, when confronted with his answer. This statement, in our opinion, is quite unwarranted by the testimony referred to; and an examination of pages 731 and 773 of the record will make it quite clear that Mr. Noyes was not professing to give specific dates, plainly stating on page 731 that "it was a good many years ago, and I really do not remember it"; and on page 773 saying, "I believe I said in the nineties; it was in the nineties, or the early part of the 1900—it is so long ago

I am unable to remember the exact dates." We submit that no such inference as the appellee would suggest may justly be drawn from these pages of the record referred to by him.

It is asserted at page 103 of the appellee's brief that "the corporation has never made a profit since the cyanide plant was installed"; but it is impossible, we think, to reconcile this extraordinary statement with the profit exhibited in the Klink, Bean and Company report, schedules 4, 6 and 8, at pages 996, 998 and 1000 of the record. This remark of the appellee is quite upon a par with his observation at page 168, relative to the "sudden" decision by Mr. Noyes that a cyanide plant was a necessity,—a remark which ignores Mr. Noyes' consistent attitude upon that subject since the early part of 1907, and likewise ignores the commanding fact that, because of the decline in ore values during the latter part of 1912, the high cost of reduction and conditions in the silver market, the time had at last come when what he had long wished to do would have to be done then, or not at all.

On pages 104 of the appellee's brief, certain figures are given relative to what is described as "finances"; and on page 119 of appellee's brief, the statement is made that the Presidio Mining Company, at the time of the acquisition of Section 5, "had $51,000 of liquid assets". Bearing in mind that what we are dealing with is the financial ability of the Presidio Mining Company to acquire Section 5, it will be observed that in the figures on page 104, the appellee actually includes in the "liquid assets" the claim against Osborn for

$10,689.75 misappropriated by him, and the item of $22,752.15 of "supply inventories", the whole aggregating $33,441.90; and the effort is to make it appear that, at this time, the company had sufficient liquid assets to enable it to acquire Section 5 for cash. Surely, no sane man would accept, in a cash transaction, payment by a claim for $10,689.75 against a broken reed like Osborn; and since the stockholders of the Silver Hill Mill and Mining Company had never developed Section 5, had never intended to develop it, and held it for speculative purposes only, it is plain that they would have no concern with a lot of mining supplies for which they had no use. To test the good faith of the appellee in this connection, we ask which of the so-called "assets", purported to be set forth on page 104 of the brief, could really be used to pay the purchase price of Section 5? We submit that the only items which, upon any theory whatever, could be available would be the cash in bank, $8380.91, and the bullion in transit amounting to $10,605.03, the whole aggregating $18,985.94, which amount would, of course, be reduced by the mine overdraft and unpaid invoices aggregating $11,612.44, thus leaving a net of only $7373.50. This "net" would not, however, be in the form of cash until the bullion in transit had been transported, refined and paid for, a procedure which requires fifteen days at least (908). Can it be believed, then, that the purchase price of Section 5, or of any mine, could be made by the remaining items in the list on page 104, namely, milling and mining supplies, and a more than doubtful claim against an individual for cash abstracted by him from the company treasury? And it may be added that, regardless

of all other considerations, when we contrast the figures on page 104 of the appellee's brief with the statement on page 119, that the company had "$51,000 of liquid assets", we cannot but regard the procedure of the appellee as wholly indefensible, and as raising no additional presumption in favor of one straining to convict another of a fraud.

At pages 105-6 of appellee's brief, and very likely at other places also, the commutation of the tramway contract is referred to, it being asserted at the place cited, for example, that Mr. Noyes bound the corporation to pay Messrs. Gregg and Gleim a profit of $9000 as a bonus on the loan; but the fact is, and it is plain from this record, that the directors authorized the commutation of the original contract (for building the tramway and operating it for one year) by the payment of the estimated profit; and as we argued in our opening brief, there is nothing in or about this commutation which differentiates it from any other ordinary business dealing within the scope of the discretionary powers of the directorate, or transmutes it into an act of fraud. There is, indeed, nothing legally or morally wrong with a commutation of a contract, and in the present instance, as the uncontradicted figures make clear, this commutation was beneficial to the company. Indeed, supplementing what we said in our opening brief, it may be added that commutation is as ancient as the break of the feudal system, when service was commuted for rents, and the peasants began to achieve their emancipation; instead of the mutual obligation of service and defense, the cash-nexus, as Carlyle called it, became the principal tie between the lord and his tenants.

At the bottom of page 107 of appellee's brief, the somewhat astounding assertion is made that "this responsibility (for Mr. Noyes' financial obligations) was assumed by the corporation". We are wholly unable, from our recollection of this record, to find any page thereof which authorizes this statement, notwithstanding our general knowledge of the case, an examination of the records of the company admitted in evidence, and a reconsideration of the testimony. Surely, so important a transaction as the assumption by a corporation of Noyes' financial obligations should be concreted in some sort of a visible form, at some particular time and in some specific manner; but an inquiry as to when, or where, or how, or on whose motion, or by what instrument this asserted assumption was consummated, is wholly fruitless,—no answer can be found to these inquiries, and we must dismiss this assertion as but another vagary of the disordered imagination of the appellee.

Recurrence is again made, on pages 135 and 145 of the appellee's brief, to the subject matter of company expenditures asserted to have been made in connection with traveling expenses and telegrams claimed to relate to the purchase of Section 5; and while this matter has been referred to heretofore, yet it can do no harm to remind the court that the testimony plainly establishes, and without the slightest contradiction, that the traveling here referred to was the trip which Mr. Noyes made to Texas to arrange for, organize and start the building of the company's cyanide plant, and that none of this money was expended in any arrangements relative to

Section 5. And so far as the $22.05 for telegrams is concerned, it may be observed that there never has been any evidence of the contents of these telegrams, or any reason to suppose that they involved anything but the ordinary business of the company or were in themselves anything more than ordinary monthly petty cash items. The evidence plainly establishes that no expense was incurred in the securing of the options of the stock of the Silver Hill Company, and there is no evidence whatever connecting the $22.05 for telegrams with the acquisition of Section 5.

It is stated on page 146 of the appellee's brief that "the price of silver in November and December, 1912, was higher than for many years"; but it is not to be inferred from this that the price of silver was high on other occasions. As the table which has been introduced in evidence will show, silver, like any other commodity, is not without its fluctuations; and in making the above quoted statement, the appellee omits to explain that following upon December, 1912, there was a long continued and acute depression in the price of silver. During the years 1913, 1914 and 1915, the decline in the price of silver below sixty cents caused a shrinkage of $136,948.47 in the company's income, as shown by the Klink, Bean and Company report (983-4); and the letter of Mr. B. S. Noyes to the complainant Overton, inserted in the appendix to appellee's brief at page 31, shows that the operating profit of the company for the years 1913 to 1915 was as follows: During 1915, the gain was $20,209.30; during 1914, that gain was $46,055.06; and the aggregate gain for these two years was $66,264.36.

But during the year 1913, there was a loss of $3543.71, a loss which was to be expected for the reason, if for no other, that this was the transition year between the old pan-amalgamation period and the new cyanidation; and this loss leaves the operating profit for these three years at $62,720.65.

The last paragraph of Mr. Noyes letter calls Overton's attention to the effect of that decline in silver, thus giving him the means of checking up the figures. It should be observed in this connection, that the letter in question deals with the company's fiscal years, not calendar years, and with operating profits which take no account of ore purchases, paid or unpaid, nor of depreciation and depletion entries. It is further to be observed that out of these earnings, the company had to pay for improvements, which cost, in round numbers, $80,000. When all of these circumstances are considered cumulatively, the extraordinary character of the appellee's series of statements concerning financial conditions, and particularly his statement that in 1914 the company for the first time had creditors, becomes sufficiently obvious.

What authority can be found for the acrobatic performance assumed in the middle paragraph of page 161 of appellee's brief, we are quite at a loss to determine; we know of no witness, document, fact or theory of fact to justify this piece of imagination. On the contrary, we do know that the testimony is particularly specific about the repayment into the company treasury by Osborn of the amount of his shortage as then known, the details being very fully set forth in the record. The

record shows actual deposits to the company's credit aggregating $10,689.75, and by no imaginative effort are we able to transform restitution into concealment. Also on the same page, and in the passage to the effect that

> "what should have been done was to have a tabulation made of the amount due on the shortage of Osborn and a charge on the company's books made against him, and payments made thereon to the extent of said indebtedness",

we are favored with the views of appellee, rather than a statement of the facts visible in the record; but one needs scarcely be an experienced business man to know that the instant such a condition becomes known to persons who are extending, or about to extend, credit to the company, such credit would have been instantly refused, the new cyanide plant would never have been installed, the company would have gone to the wall, Osborn necessarily would have gone to the wall with it, and there would have been no "payments made thereon to the extent of the indebtedness". Instead of pursuing such an insane course, ore of good grade was rushed from Section 5 to the company's mill, and payment well within the value of such ore was made to Mr. Noyes in a sum sufficient to enable him to make the loan to Osborn whereby the shortage was made good through the deposit of the identified checks to the credit of the company; and when all this was accomplished, the company had real, tangible, actual silver ore, or the produce of the bullion from that ore, instead of "a charge on the company's books" against an insolvent debtor, and the ruin of its plan through publicity given the fact that its cash was gone. To suggest a somewhat homely illustration of this point, let us suppose that the proprietor of a

fruit store has exposed a tray of oranges which he has bought and the cost of which has been entered in his books, and that the ubiquitous small boy steals an orange from the tray, is pursued, caught and compelled to restore it; should the shopkeeper thereupon go inside and make an entry on his books setting forth that theft and its restoration? The obvious answer is, "no".

On page 163 of the appellee's brief, reference is made to the voting trust which was organized in 1914, after the history with which we are concerned in this cause had already been made, although, with much discretion, the appellee omits to state the date when this voting trust was formed. Another striking feature of this reference to the voting trust is suggested by appellee's variable point of view with reference to Miss Doherty. For Miss Doherty, the appellee has nothing more than such compliments as "pliant tool" whenever she makes a statement which fails to harmonize with his theories; but whenever that lady states, not something which prospers his theory but which he imagines prospers that theory, then he is swift enough to refer to her and her testimony. This attitude may be illustrated by the declaration on page 59 of the appellee's brief to the effect that Miss Doherty was a lady without business experience who blindly followed Mr. Noyes' dictation, and a lady whom he refers to on page 118 as "the echo" and the "pliant tool in their hands"; and yet, when he desires to make an imperfectly stated point with reference to the voting trust it is to this very lady without business experience who blindly followed Mr. Noyes' dictation, this very echo and this very pliant

tool, that he resorts as his authority for his statement with reference to the voting trust. In the opening brief, we comment upon the formation of this voting trust, and cited the authorities supporting it; and we also discussed fully the circumstances under which the word "control" entered the testimony of Miss Doherty upon that subject. Further elaboration in this place seems unnecessary.

At the bottom of page 164, and the top of page 165, of appellee's brief, the following remarkable statement will be found:

> "Since September 23, 1915, when Osborn was deposed, Peat has been secretary with a salary of $250.00 part of which continually found its way into the Osborn family, according to an affidavit made by Peat and filed in the trial court".

We have no hesitation whatever in denouncing this statement as one wholly unjustified by anything contained in the record before us. The only affidavit by Mr. Peat before us will be found in Volume 2, pages 329-332 of the record; and in that affidavit, nothing can be found to support the statement contained in the appellee's brief. Although nothing contained in the appellee's brief required us to do so, nevertheless, we have re-examined the testimony of Mr. Peat for the purpose of ascertaining whether any support might be found therein for the above quoted statement by the appellee, but that search revealed nothing whatever to show that any portion of Mr. Peat's salary continually, or otherwise, found its way into the Osborn family. Of course, even if Mr. Peat, out of his salary, should choose to assist the family of a man whom he had known for many years, we should regard that as a kindly act on his part, but we should

not consider it as establishing any fraud on the part of Mr. Noyes, either in the transfer of the Osborn stock, or in the acquisition of Section 5. In a word, even if Mr. Peat assisted the Osborn family, that circumstance, however creditable to Mr. Peat, would not be relevant to any of the issues in this cause; but, of the fact itself as stated in the passage quoted in the appellee's brief, no part of this record furnishes any support.

On pages 169-170 of appellee's brief, the contention seems to be presented that during the first four months of 1913, the company was prosperous, but as pointed out by Klink, Bean & Company in their answer to defendant's suggestion No. 17 (985) the average value of the ore from Section 5 during 1913, was $18.57 per ton, declining in 1914 to $9.43, and in 1915 to $6.96. It should further be borne in mind in this connection that, as shown by Klink, Bean & Company's answer to defendant's suggestion No. 7 (982), the cost of operation in 1913, which was a year of transition and interrupted production, was $11.23, and in 1914, it was $8.07, and in 1915, it was $5.64; and it should not be overlooked that these costs include San Francisco expenses and royalty. In other words, all of the expenses of operation, *with Mr. Noyes' royalty added thereto,* were $8.07 in 1914, and $5.64 in 1915, as against an average cost of $9.51 from 1907 to 1912 (Klink Bean report, answer to defendant's suggestion 6) (982). Would not any business man, then, be rejoiced to be thus "defrauded", "plundered" and "pillaged"?

The whole claim of the appellee between pages 170 and 172 of his brief impresses us an insincere. Taking, for example, the declaration at the top of page 172 that

"Noyes' claim on August 28, 1916, would be approximately $78,000", and contrasting it with the testimony of Mr. B. S. Noyes at page 1061 of the record, it becomes entirely clear that in April and May, 1916, the company had two unusually good months, and that it was only if the rate of earning of that period of two months should have continued, that the claim of Mr. Noyes would amount to the sum claimed by the appellee in the question at the end of page 1060; but, as pointed out by the witness, this would be so only

> "if it kept on at the same rate, but the rates vary monthly * * * if the rate mentioned by Mr. Rose were maintained throughout the year, it would amount to about the figure he says, but the rate is not going on like that now, or anything like it" (1061).

And, it should be remembered that the table given on page 93 of our opening brief does not purport to be a statement of capital worth; if it did, the first item there mentioned "its $80,000 plant paid for", would necessarily have been added to the other items there stated making the aggregate $165,576.44, from which the deductions referred to upon appellee's brief on page 177 should be made; that is to say:

Total assets (exclusive of mine)		$165,576.41
Accrued operating expenses (appellee's brief, 171)	$22,600.00	
Credit to W. S. Noyes, January 1, 1916 (Record 1060)	49,000.00	
Further royalties to July 1, 1916 (Record 1060)	23,000.00—	94,600.00
Surplus (approximate)		$70,976.41

In other words, there was no deficit, and if the appellee had paid attention to the figures before him, he would have known it. It should be added that throughout page 172 of his brief, the appellee deals with cash only, and puts all other assets out of consideration, through which rather absurd procedure, he reaches the conclusion stated on page 173, that the company was bankrupt in August, 1916. But the figures which we have quoted can all be readily substantiated, or equally readily controverted if they are incorrect; and we believe that the attitude taken by the appellee in this connection, instead of supporting his clamor of fraud, resembles more closely a breach of the Ninth Commandment.

On page 178 of appellee's brief, *ad finem,* speaking of the computations made upon the bullion production from Section 5, it is declared that these computations "were made by him (Mr. Noyes) without check of any kind"; and we cannot help but regard this a most unfair statement. No proof is made anywhere that these computations were improperly made; and a sample bill from Mr. Noyes for one month's royalty, together with the sheets on which the calculations are made, is inserted in the transcript of record (at pages 946-7), and the court may there see with its own eyes that anyone who is so inclined can check all of the computations.

At pages 185 and 187, and, of course, at numerous other places throughout appellee's brief, references are made to the concealments of records, falsification of company books, and destruction of letters and documents; accusations of this kind, are inevitable in litigation of this character; and while the appellee does not

quite say so in so many words, yet he very plainly implies that these appellants have done these things; and he does say on page 185 that "appellants have continued to conceal information and destroyed records". We have heretofore very fully discussed this matter, and need not go into it again at large; but since the accusations here made are really accusations of crime (Cal. Penal Code, Section 573), and are not supported by the facts contained in the record, we feel that we have a right to protest against statements of this kind as being not only false but also slanderous. While it is stated on page 187 that in November, 1915, Mr. Gleim refused access to Overton to the books at the mine on orders from Mr. B. S. Noyes, still the appellee very carefully refrains from saying that Overton had already been given full access to those books in August, 1915 (915). In connection with this subject, we find, beginning at page 215, some further space given to it in appellee's brief; and in view of what is there said, the idea of the appellee seems to be that when the defendants below came into the directorate and found the company's treasury depleted they did not go abroad upon an excursion to discover non-resident stockholders, and to acquaint them with facts that those non-resident stockholders might well have ascertained for themselves. The claim that the records were falsified seems in substance to dwindle to the fact that no entries were made in the books when the money was deposited in the bank to make up the difference between the amount that should be there according to the cash book, and the amount that was actually there; but, as we have ex-

plained more than once, no such entry was necessary or even proper. So far as the entries concerning the $3500 transaction are concerned, the only relevant testimony upon that subject is that of Mr. B. S. Noyes, quoted in appellee's brief on page 197, in which it is explained that these entries were correct and in accordance with proper bookkeeping practice to record the facts as they happened; and it is to be observed that there is no testimony to the contrary whatever. It seems to be the attitude of this appellee that it is a positive crime to destroy any paper belonging to a corporation, no matter what its character or importance, but such does not appear to be the law. It is, indeed, a matter of common knowledge that in every business concern, more papers go into the waste basket than into the files of the company; the law of the State defines with accuracy what records of a corporation should be kept; and the Penal Code provides penalties for the destruction of such records with criminal intent. The appellee's whole course upon this subject has been a persistent effort to induce the belief in the mind of the court that essential and important documents were missing or had been destroyed; but the only particulars which he furnishes are a few unimportant letters, extracts from which appear on pages 35 to 38 of the appendix to his brief; and it is to be observed that these documents could not very well have been concealed from this appellee, or his wife would not have been able to reproduce extracts from them. It is also obvious from the extracts themselves that they were of no serious consequence whatever so far as the business of the corpora-

tion was concerned, and that the greater part of these letters were on file, as may be gathered from the appendix to the appellee's brief, page 34, where the appellee's wife writes that "there were copies of several letters in the office at Shafter in August, 1915, from which Captain Overton took extracts". And the appellee has, moreover, persistently sought to induce the belief in the mind of the court that he had been excluded from the office of the company at Shafter, and had not been permitted to see the company records there. But, by reference to pages 582-3 of the transcript of record, it will be seen that when the appellee visited the mine in March, 1915, the superintendent exhibited to him all sorts of records; "we went over that annual report together"; "I was present part of the time with Mr. Gleim alone in the company's office at Shafter"; "I went into the mill at that time"; and on page 916 appears a letter from the president to the superintendent advising the latter to give this appellee "access to the books, letters, maps, tables and records of the company as he may require". And while the appellee testified that he had been refused access to the Shafter records upon a later occasion, he very carefully suppressed the fact that they had been freely thrown open to him during August. On page 215 of the appellee's brief, reference is made to the disappearance of all telegrams and letters pertaining to transactions had between Mr. Noyes and the company, its officers, and his brother in December, 1912, and January, 1913; and in connection with that statement, a reference is made to page 34 of the appendix to the appellee's brief; but we are quite

unable to understand the pertinency of this reference, because it plainly appears upon the page cited that no mention is there made of any correspondence in December, 1912, and January, 1913; aside from indicating the appellee's misapprehension of the facts, we can perceive no purpose in the citation in question. It will, of course, be remembered that Mr. Noyes was in Texas continuously from about the middle of December, 1912, until the early part of the month of February, 1913; there is no testimony in this record that, during this period, there were any letters or telegrams between him and any officer of the company; nor is it reasonable to suppose that there would be any—there seems to be no occasion for any. The only testimony bearing upon that point is that there were one or two telegrams passing between Mr. Noyes and his brother Mr. B. S. Noyes who was not at that time in any way connected with the company, and it need hardly be said that such messages have no place in the company's files. It further appears that during January, Mr. Noyes wrote or telegraphed to his brother requesting him to deliver the lease of January, 1913, to Osborn, and to ask the latter to call a meeting and have the lease authorized. Here, too, it is obvious that the correspondence was nothing more than a mere request from Mr. Noyes to his brother to execute an errand for him. It therefore appears, the more one analyzes the situation, that the complaints of this appellee upon this general subject-matter are not only extremely unfair, but also involve a very complete misapprehension of the actual facts themselves.

On page 187, we find a recurrence to "an alleged defect in the amendment to the by-laws" thereby having reference to the date of the annual meeting of the company. It will be recalled that in this matter the directorate acted upon the advice of counsel; no claim is made, or argument presented, that the advice of counsel in this respect was bad law; and whether it was good law or bad law, the directorate acted in good faith upon it, and, as remarked in *Cowell v. McMillin,* 177 Fed. 25, 42, the suggestion that the course which the directorate pursued was in pursuance of legal advice, is a wholly reasonable one.

Beginning at page 187, we find comments made upon the testimony of the witnesses in the case, those for the appellee being treated as impossibly good, pure and unsullied, while those who were offered by the appellants were all bad and wicked,—a rather crude form of classification, we think. We do not see why it should be an offense on the part of Mr. Cleveland that he is a director in the Marfa National Bank which loaned $10,000 to Mr. Noyes; and we suggest that the very fact that Mr. Cleveland, who is apparently a man of substance, put his name upon Mr. Noyes' note for $10,000 (a fact treated with great delicacy by the appellee), would seem to indicate that Mr. Cleveland had faith in Mr. Noyes, and negatives not only the claim that Mr. Noyes had neither money nor credit, but also the claim that the company was flourishing, had a good credit, and was amply able to purchase Section 5. What purpose the appellee had in mind in referring to the increases in Mr. Gleim's salary, it is difficult to discover. It is to be ob-

served, however, that the appellee omits to state that the duties and responsibilities of Mr. Gleim increased, and that the work at the mine and mill and all the processes of production there, more than doubled. And it is further to be observed that it is not true that Mr. Gleim and Mr. Noyes together did the work which Mr. Noyes did alone at the mine, for the reason that, when Mr. Noyes was alone at the mine, there was not tne same amount or character of work to do. In referring to the testimony of Mr. Peat, the persistent blinking of the distinction between a mere bookkeeper and a secretary seems to be continued. And the only basis for the claim that Mr. Noyes had "ordered" the adoption of the lease of January 25, 1913, is that Mr. B. S. Noyes carried a message from his brother to Mr. Osborn asking him to call the Board together and take official action; and in this transaction, it is entirely plain that Mr. B. S. Noyes was acting as a messenger without any interest in the matter in hand. The reference to the orders to refuse Overton access to the books in Texas would have been fair and complete if it had called the attention of the court to the fact that Mr. B. S. Noyes had previously given Mr. Overton full access to all of the books and that Mr. Overton had enjoyed such access.

It would be impossible, within any reasonable limit of space and time to take up item by item the diatribe against Mr. William S. Noyes; but, directly or indirectly, most of the subjects of this diatribe have been heretofore treated, including such rash statements as that Mr. Noyes "acquired this corporation" (193), that "he

cancelled the lease" of January 25, 1913 (193), and the attempt to show a contradiction in Mr. Noyes' testimony because he stated that the resolution of February 15, 1913, approximated one-half of the expected net profits from Section 5, and also testified that he did not know the value of Section 5, it being only necessary to say in this last connection that the resolution mentioned did not imply a certainty of a total net of $90,000, because the condition therein contained made it quite certain that Mr. Noyes would never be paid $45,000 if the venture, which was hazardous and conjectural in the extreme, did not turn out well. Nor do we perceive any inconsistency in Mr. Noyes' testimony as claimed on page 194, that he had to buy Section 5, without an adequate examination, and yet that he made a careful examination of stope 13. We do not concede the accuracy of anything stated on page 194, if by the statement therein contained it be sought to imply that Mr. Noyes made a careful examination of stope 13; and we urge that the contrary is fairly to be gathered from his statement on page 749 of the record that

> "the only ore body that I examined in Section 5, before paying for it, or for the stock of Section 5, was that stope 13, *and that examination was necessarily confined to looking at these two drifts and the winze*".

But, even if we were to accept the declarations of the appellee's brief, it would still be true that the two statements are not in any way inconsistent, because even a careful examination of a limited area in a large mine would by no means give one full and complete knowledge of the value of the mine as a whole.

It is practically impossible to reduce to form and order the disjointed discussion, if it may be called such, contained in appellee's brief between pages 196 and 205, so as to enable one to know how much thereof is intended as a statement of what is supposed to be the facts which are supported by evidence, and how much is intended as argument. All that one can do is to make the best running commentary thereon practicable. It is not true that, as stated on page 196, the defendant below admitted concealing the Osborn shortage. It is true that testimony was given in the cause below that this shortage was repaid to the company by the actual deposit by Osborn of money loaned him by Mr. Noyes; and it is also true that for the $11,000 which was paid Mr. Noyes under the resolution of February 15, 1913, the equivalent in ore was delivered by Mr. Noyes to the company; and the net result of the transaction was that the company had in its possession real tangible visible ore instead of an uncollectible claim against a hopeless bankrupt. And that the company did not suffer by this transaction would be indicated by the insistence with which the appellee asserts that the company made a net profit of $23,000 from January to April, 1913—, a profit by the way which, as indicated by the Klink Bean Company report, came from Section 5 ores. The declaration that the defendants were forced to admit any of the matters referred to in the appellee's brief is wholly unfounded and unwarranted, their testimony being given freely and voluntarily. No evidence was produced in support of the assertion that the complainants below accused all of the defendants except Peat of par-

ticipating in the bonus; and we deny with equal emphasis the statement that an acknowledgment of the falsity of certain book entries was made by the defendants, and point out that the portion of the record quoted on page 197 of the appellee's brief to support that statement, does not give it any support whatever. On the contrary, the portion of the affidavit of Mr. B. S. Noyes there quoted is a straightforward account of precisely what entries were made and why they were made. The testimony of Mr. B. S. Noyes quoted on page 198 is not inconsistent with the transactions concerning the making good of a $3500 shortage as detailed on page 197; both sets of facts were and are true. The books were correct and in balance, and the shortage was made good. Just how or why the letter (382--4), a portion of which is printed on page 200 of appellee's brief, is in the slightest degree discreditable to its writers, is impossible to understand, it being quite obvious from the letter itself that the writers took Klink Bean's report for many of the facts which they state therein, and regarded the $1800 referred to therein as a further shortage; and the appellee himself furnishes in the next paragraph the complete explanation that the $1800 matter turned out to be a part of the $3500 which Mr. Noyes required Mr. Osborn to make good in September, 1913, as set forth in the quotation at pages 197-8 of appellee's brief. The copies of various entries inserted at page 201, are, owing to the limitations of print, not in the form in which they appear on the books, and are not in the chronological order, and can only confuse unless explained. The first in time is the entry of Sep-

tember 30, 1913, in cash book No. 1, page 100, "Sundry receipts, $3500"; and is a correct entry of the receipt of that amount. The next in order is the third entry shown on page 201, viz., Ledger No. 1, page 133, "sale of quicksilver, etc., September 30, 1913, $3500"; this is intended for a reproduction of a ledger page showing the posting of the item last above mentioned from the cash book into the ledger; it is erroneous in that the item is posted in the wrong account. The next in order is the second entry reproduced on page 201 of the brief, and should be in this form: "Sale of quicksilver, sundries, etc., $3500. To Profit and Loss, $3500". This is a correction entry to cancel from the ledger the item last above mentioned and place this item to the credit of profit and loss. The next in order is the last item shown on page 201, viz., Ledger No. 1, page 50; "Profit and Loss account, October 6, 1913, Sundries, sales, etc. $3500". This is intended as a reproduction as a ledger page headed "Profit and Loss", showing the posting of the second half of the item last above mentioned from the journal into the ledger to the credit of profit and loss. The ledger page which shows the posting of the first half of the item last referred to is not reproduced at page 201. It would show on the right, or credit, side, a posting from cash, September 30th of $3500; and on the opposite, or debit side, a posting from the journal, October 6, of $3500, the one balancing the other. This same explanation in connected words, but not graphically, is quoted on page 197 of the appellee's brief. But this entire portion of appellee's brief from page 196 to page 205 is based

upon a misconception of one of the most frequent transactions known to the business world, viz., the transfer of credits instead of cash. Every man does substantially the same thing when he pays a bill with his check. He transfers to his tailor or grocer a credit; the latter acknowledges payment but does not receive the sum; he deposits the check with his bank, which acknowledges the receipt of so much money, but it receives nothing but a credit; the bank sends the check to the Clearing House where it is delivered to the bank on which it is drawn; the latter bank acknowledges receipt of so much money, but it received no money, but a credit; it is then taken to the last mentioned bank, and that bank charges the drawer of the check so much money; but it has not paid him any money, any more than the Presidio Mining Company paid Mr. Noyes in cash $3500. In both cases the medium of trade was a credit. In other words, the giving of a receipt for $3500 by Mr. Noyes to the Presidio Mining Company, and the entry by Osborn of $3500 without the actual passing of the coin, is one of the most commonplace transactions in business, and the numerous pages of labored discussion on this subject in the appellee's brief, were but a waste of printer's ink. Had the $3500 in coin been placed in a sack, the same entries would have been made in the books, the sack of coin would have passed from Noyes to Osborn, from Osborn to the company, and from the company to Noyes, landing just where it started, and the appellee's criticism would have been obviated; and according to the appellee's theory such a journey of a sack of coin around such a circle would have made the transaction

innocent instead of wicked,—but business men do not do such idle things.

At page 212 of the appellee's brief, we find the complaint that it was unnecessary to have a general manager in San Francisco at $450 per month; and if the only usefulness of a general manager were to handle a pick, there was probably no such necessity. But if the functions of a supervising engineer are to supply brains, technical and scientific knowledge, and to lay out and install improvements, it can readily be seen and appreciated that an engineer can often give better service from a large city where he constantly meets and confers with men of his own profession, than if he is immured in a remote wilderness; and this appellee himself pays an unwitting tribute to Mr. Noyes' ability on page 210, in saying that on him alone depended the success or failure of the company. He has, in truth, made a conspicuous success in withdrawing this company from its calamitous condition and setting it upon the road to prosperity; and we do not think his reward for this should be a finding of fraud. While we are on this topic, it may be added that we do not understand how a corporation can well exist without a president; and as to the salary of Mr. B. S. Noyes, we do not believe that there is a mining company in the country doing a business of the magnitude of this company's business, and getting the results which this company is getting, which pays its president any less than $125 per month.

At page 228, appellee yields again to his unfortunate habit of indulging in rather chimerical hypotheses when he asks

> "what might prevent disposing of all the Osborn stock to third parties if not impounded (we suppose appellee means the stock, not the third parties) as the facts at the time of the granting of the injunction indicated they were about to do?"

But instead of disposing, or of attempting to dispose of the stock, no one is better aware than this appellee that the evidence shows that Mr. Noyes' holdings in stock increased largely after this action was begun, that over our objection it was shown during the trial that Mr. Noyes had bought one particular lot of 6800 shares, and that Mr. Noyes' holdings of stock, at the time of the injunction, were larger by several thousand shares than they were when the action was commenced; and as to this phase of the matter, we commend for appellee's study the observations of this court in *Cowell v. McMillin,* 177 Fed. 25, 38.

In the observations in the appellee's brief, upon pages 229 and following, concerning the condition of the company in January, 1918, a labored effort is made to make that condition appear different from what it actually was. At the bottom of page 230, the appellee quotes a passage from appellants' brief, and then on page 231 "contrasts" that quotation with "B. S. Noyes' sworn statement from which it was derived". But an attentive perusal of the objections of the defendant below to the appointment of a receiver (Record 3, pages 360 et seq.) will disclose that the statement of Mr. B. S. Noyes deals with the condition of the company as of January 24, 1918, and not of the date of January 28, 1918, when it was sworn to; that the table shown on page 362, purports to be neither more nor

less than a statement of the *net liquid assets* of the company as of that date; and that the table shown on page 365 purports to be something wholly different from that on page 362, viz., a table of the assets of all kinds, liquid or otherwise (excepting the mine),—there inserted to illustrate the assertions of the defendants below that they had added largely to the assets of the corporation during their administration. In other words, these two tables deal with different matters, were introduced in different connections, and there can, therefore, be no fairness in "contrasting" them. There is, indeed, no essential discrepancy between the two, because, as a matter of fact, they are the same, excepting that the permanent equipment is not included (as it should not have been) in the statement of net liquid assets appearing on page 362 of the record. Moreover, the appellee studiously avoids the obvious fact that, in the objections of the defendants below to the appointment of a receiver, the defendants' figures and arguments were based upon the assumption of Section 5 being finally adjudged to belong to the Presidio Mining Company; and on page 365, the defendants state very plainly that "on the assumption that Section 5 will finally be adjudged to be the property of the Presidio Mining Company, said corporation is free from all indebtedness"; and it is especially to be observed that the whole argument of the defendants was that the company was perfectly safe until final judgment, because the defendants had been restrained "from paying any money to William S. Noyes on account of Section 5" (364). It cannot, we think, be disputed that if Section 5 be finally adjudged to belong

to the Presidio Mining Company, then the figures furnished by the defendants below and shown on pages 362 and 365 of the record were absolutely correct, viz.: total assets, January 25, 1918.....$349,286.27; and total *liquid* assets January 25, 1918,... 192,249.99; with no charge against those assets except the January expense (less, however, bullion in transit) and the income tax (whatever it might be), so that the liquid assets alone would be something over .....$117,449.99, with permanent assets.....$157,036.28 additional. Therefore, upon the assumption that the decree of the District Court should be affirmed, there is no conceivable excuse for the appointment of a receiver.

The vice in the figures reproduced in the appellee's brief, pages 230 to 232, lies in the fact that they persist in dealing with the figures upon the assumption that Section 5 will be adjudged to be the property of Mr. Noyes, while they insistently demand a decree adjudging that section to be the property of the Presidio Mining Company; and also because the figures are garbled.

Turning to a consideration of those figures, we beg to point out that the table reproduced on page 231, and which appears in page 362 of the transcript, is a correct statement of the net liquid assets and the correctness of those figures has not been questioned. Proceeding to appellee's comments thereon, on page 231, we find that appellee wrongfully deducts $24,800 for January operating expenses and $50,000 for income tax.

The appellee well knows that $50,000 was merely an estimate and could not be anything else; that it was made on the theory that Section 5 belongs to the company; but that if Section 5 belongs to Noyes, the $110,000 estimated as his share of the one-half of the net profit from Section 5 due up to that time, is not a part of the earnings of the company and the income tax would be reduced to less than $25,000; that all the bullion for the month of January is not accounted for in the amount of $192,249.99 as "liquid assets", but that said sum would be increased by about one-third of the month's production of bullion. In other words, the figures stated at page 391 of appellants' brief, quoted in the appellee's brief at pages 230-1, do not include all bullion in transit; and even assuming the payment to W. S. Noyes of $110,000 as assumed by appellee on page 232 of his brief, the balance of the cash, bullion in transit and mining supplies there stated as $7,449.99, would be increased by about one-third of the month's production of bullion and by the difference between the estimated amount of income tax and that which was actually found due.

Moreover, the income tax was neither levied nor due and, as a matter of fact, there was more than ample time between the time when Mr. Noyes speaks and the time when this income tax would be levied and "become due", to earn several times the amount thereof, whether Section 5 belongs to W. S. Noyes or to the company.

We come back, therefore, to the fact that the total liquid assets at the time when B. S. Noyes speaks are, as stated by him, the sum of $192,249.99, exclusive of

about one-third of a month's production of bullion. The balance of $117,449.99, at the foot of page 231 of appellee's brief, is therefore increased by the amount of such bullion in transit. The culmination of appellee's attitude appears at page 232 of his brief, where he attempts to make a comparison of the "net worth" of the Presidio Mining Company's assets in December, 1912, with the "net worth" in January, 1918, and the offense consists in excluding from the "net worth" in January, 1918, all the permanent improvements belonging to the company.

After remedying this careful omission, the comparison would be about as follows:

Assets January 24, 1918		$349,286.27
Less amount assumed to be due		
Wm. S. Noyes	$110,000.	
January operating costs	24,800.	
Income tax, estimated	50,000.	184,800.00
Leaving a "net worth" of		$164,486.27
"Net worth" December 31, 1912,		48,212.11
(K. B. Schedule 15, Record p. 1008, Col. 2),		
Gain in assets in five years		$116,274.16

This result is arrived at by taking the worst possible view, so far as the appellants are concerned; and even so, it would seem that any reasonable man should be satisfied with an administration that makes an average gain of 15½% upon the capital stock (which is what the above named gain in assets figures out) for a five-year

period, the first three years of which presented about the worst possible conditions for successful operation that could well be imagined. But it is to be noted that the statement just made by us is grossly unfair to the appellants in the following particulars:

(1) The "net worth" December 31, 1912, stated by Klink, Bean & Company contains, as a part of the assets, an item of $10,689.75 due the company from L. Osborn. It is certainly not fair that in passing upon the appellants' accomplishments it should be assumed that on the date last mentioned that particular sum of money should be treated as an asset worth its face value; but, on the contrary, it should be stricken bodily from the assets going to make up the "net worth", and instead of having a "net worth" of $48,212.11, there actually was, on December 31, 1912, a "net worth" of $37,522.36.

(2) The item of $50,000 for income tax was not, in January, 1918, yet levied nor due and it was not payable until the following June. Therefore, although mentioned by defendants below in their opposition to the appointment of a receiver (Trans. pp. 362-3), it was there mentioned by way of forecast as an obligation that would later accrue and not as one then due. It hardly needs to be argued that an obligation which would not become due and payable until six months later should not be treated as a then existing debt, and this sum should be bodily stricken from the deductions, in order to fairly show the "net worth" in January, 1918.

(3) The January operating costs were, to a considerable extent, counterbalanced by bullion in transit and to come for the remainder of that month, but as there are no figures for this in the record, we will let it pass.

Hence, a statement of "net worth" as of January, 1918, eliminating the matters set forth above, is as follows:

Total assets January 24, 1918		$349,286.27
Less amount estimated to be due W. S. Noyes	$110,000.	
January operating costs	24,800.	134,800.00
"Net Worth"		$214,286.27
"Net Worth" December 31, 1912 (eliminating amount due from Osborn as an asset)		37,522.36
Increase in assets in five years		$178,963.91

which amounts to $35,392.00, or 23.58%, upon the company's capital stock, per annum.

Two facts stand out conspicuously as a result of this discussion:

(1) That these appellants who, during their administration, have increased the company's assets at the rate of 23.58%, on the company's capital stock, per annum, are charged with dissipating the assets; and

(2) That appellee has the assurance to ask this court to believe that a corporation whose income tax for 1917 is stated as $50,000 is a hopeless bankrupt (Brief, p. 230).

It may be observed in passing that the brief for appellee pays the defendants, unconsciously, a high compliment for their management, because it tells the court, by necessary implication, that the profit made by defendants during 1917, *was so large a sum that the income and excess profits tax thereon amount to a sum which equals 33⅓% of the capital stock.*

On the same page (232), it is stated that appellants "try to *leave the impresssion* that they have expended $157,036.28", etc. There is no effort to leave an impression; the amount was spent, the figures show on pages 368-9 of the record, and they cannot be questioned; the machinery is there and is doing the work, notwithstanding appellee's guess (p. 233) that one of the engines "has also probably worn out", of which there is no evidence whatever. This statement is followed by an effort to impress on this court the belief that the "oil engines in power house—$23,985.82" were one and the same with the engine installed in 1912. It is not the fact; there is no evidence of it; and neither of these engines has worn out, and there is no warrant whatever for any such pretense. On the contrary, appellee is well aware that the "oil engines in the power house,—$23,985.82" were installed at the mine (not the mill) and he refers on page 232 of his brief to the transcript pages 368-9, where the fact *plainly appears* from the figures 1917 followed by the word "mine" which immediately precedes the item of "oil engines in power house $23,985.82". The transcript, pp. 723-24, by reference to the annual report of 1912 (600) shows that the "brand new oil burning engine of 1912" was installed in the mill, not the mine.

In addition to the foregoing considerations, the deduction of any income tax whatever, in making a comparison with the condition of the company in December, 1912, with the condition in January, 1918, is manifestly unfair to the defendants, for the reason that, since the income and war profits tax to be paid for the year 1917, is an obligation which did not exist in 1912, it cannot fairly be treated as a matter of expense to be considered in determining the accomplishments of the defendants for that year, but is, in fact, a portion of the company's profits for that year which are contributed to the Government to help along the expenses of the war, instead of being distributed among the stockholders.

To put the matter in another form, war and excess profits taxes should be wholly eliminated from the expenses of the company so far as the affairs of the company are affected by anything done or left undone by the defendants. If the Government, as it would have a perfect right to do, should seize the company's entire profits for the year to help on the war, it could not be truthfully said that the managers of the company had not made a profit; but whatever the profits of that year may be, it is only common fairness to credit the defendants with the accumulation of that profit, whether the profit is distributed among the stockholders or whether the Government steps in at that point and seizes the same or any part thereof.

As in duty bound, we have endeavored to cover every point made by the complainants and have done our utmost to enlighten the court as to the facts in the case

and to assist the court in turning to the evidence and exhibits illustrating any point involved, yet we believe that two single pages in the transcript are sufficient in themselves to answer every criticism that has ever been made of the defendants and to give this court the most evident and striking picture of the problems that were presented to these defendants upon their accession to the directorate in January, 1913.

We refer to pages 984-5, which contain evidence furnished by Klink, Bean & Company, the employes of the court whose testimony must be accepted at its face value and is not subject to any suspicion, either as to its substance or its good faith. The situation confronting these defendants in January, 1913, as shown on those two pages, was this:

The ore of the Presidio Mining Company (Section 8) which had been declining in value for years (tabulation from defendants' Exhibit "NN" and plaintiff's Exhibit "19" appearing on page 104 of brief for appellants) and which for the company's fiscal year 1912 had averaged nineteen ounces of silver per ton of the value of $10.97 (table last quoted) declined steadily from that time on:

For the year 1913, the value per ton was $7.70;

For the year 1914, the value per ton was 4.55;

For the year 1915, the value per ton was 4.26; and on page 984 of the record, as well as page 982, Klink, Bean and Company state that the average cost from 1907 to 1912 was $9.23 at Shafter and a total cost of $9.51.

The stress of the matter in hand, therefore, lies in those undisputed facts, viz.: that the defendants below came into the management of a property having an almost uniform cost of $9.51 per ton with a yield for the first year of their management of $7.70, followed by a year of $4.55 values and that year followed by values which still further declined to $4.26. The task forced upon the Israelites by their Egyptian task-masters was child's play compared to the task that faced these defendants below. Bricks *can* be and are made without straw, but the business man has not yet appeared who can meet a $9.51 cost with an income of $7.70, $4.55, and, still less, with an income of $4.26. Such a situation would make any man ask at once, "How could they, and how did they, meet such a deplorable condition?" The evidence, taken collectively, shows that the defendants below met these conditions in the only possible way that they could be met; as defendants below could not infuse any more silver solution into the ore in the ground (and it is a wonder that the complainant has not found fault with them on that account), they did the only remaining thing; they cut the cost to below the sale value of the ore by the installation of the cyanide plant and its appurtenances. Can it be believed for a moment that their work was a sinecure? Can it be believed that such results were accomplished by merely grabbing their salaries as fast as they could get them, or by looting and pillaging the company? The common sense of the average man in the street would answer this question promptly by saying that no such result could have been obtained without diligent and conscientious effort continuously

applied to the problem until the problem was solved; and it is not to be forgotten that, amid all the ruck of fault-finding and quibbling over trivial sums and trivial questions, not once have the complainants suggested any concrete, definite course that the defendants might have pursued which would have resulted in any greater benefit to the company.

If we assume that from January to May, 1913, the company made profits from its mining operations in the sum of $24,000, and if we further assume that, instead of installing the new cyanide plant and its appurtenances, this sum of $24,000 had been expended in the purchase of Section 5, what would have happened? Taking the net value of the month's bullion covered from both mines as shown in column 12, of schedule 4 of the Klink Bean report, and dividing the same by the number of tons milled, we get the following results as to ton values:

August, 1913, $10.00; September, $11.67; October $10.51; November, $9.86, and December, $9.68; and if the new plant had not been installed, and the old mill had run continuously, these months would have been May, June, July, August and September. For the ensuing twelve months (schedule 6, column 12, divided by column 1), the average values had dropped to $6.60 per ton. During all this time, a consistent operating expense of $9.51 per ton would have prevailed; and this during that period would have entailed a loss of $2.91 per ton; and if the company had once started on this downward career nothing could have saved it.

In fact, for the year 1914, the value of this ore had dropped to $9.431 and in 1915 to $6.96 (Klink Bean & Company's schedules 6 and 8, column 14). If the installation of the cyanide plant had been postponed until 1914, when the ore values in Section 5 had dropped to $9.431, the situation would have been hopeless. During the installation of the cyanide plant, the operating cost at Shafter alone was $10.52 per ton (Klink Bean & Company Report, page 982); and we cannot assume that it would have been less in 1914, had an attempt then been made to install the cyanide plant. But it cannot be assumed that during all this time the mill would have been supplied with ore from Section 5 alone. Many of the tons of ore milled were taken from Section 8; and the average values of both mines were:

1913 (fiscal, ending August 31).....$10.97;
1914 (fiscal, 16 months) 7.50;
and 1915 (calendar year)..... 5.79
(Klink Bean & Co. report, p. 982 of Record.)

After a careful analysis of the figures, Klink Bean & Company say, in response to defendant's question No. 22, page 986, that the company might have survived for a time at least, even without the installation of the cyanide plant; but the mathematical demonstration is that it would not have lived beyond September, 1913. During 1913, 1914 and 1915, the company worked 116,202.9 tons of ore; and according to a calculation made by Klink Bean & Company (p. 3) the company would have made a loss of $249,058.39, if that ore had been reduced by the pan amalgamation process. In other words, if the directors, instead of installing the

new cyanide plant, had expended the above mentioned $24,000 in the purchase of Section 5, the company would, on September 1, 1913, have been without the new plant, and would have been making a loss of over $2 on every ton of ore put through the mill. All of this, we submit, goes to demonstrate that what the directors did was for the benefit of the company; and it must necessarily therefore be assumed that they acted honestly and in good faith.

THE SILENCES OF APPELLEE.

The appellee is silent where he should have spoken; no real analysis of the appellants' case is attempted by him; material relevant to a correct result is ignored; and these silences are vocal with significance.

Our opening brief sought to discuss the present cause in its various phases, and called specific attention to numerous features of the case; the matters referred to were all fundamental and they and their consequences were all relevant to the just resolution of the pending issues; but as to them, however, as well as to the considerations suggested by them, this appellee preserves a great, sweet silence.

The two outstanding features of this cause are the Osborn stock episode, and the acquisition of Section 5, —not that they are all of the features which present themselves in this record, but that they are very vital, the learned judge of the court below declaring the acquisition of Section 5 to be "the main matter for consideration in the case". In order to deal intelli-

gently with these features of the case, it became necessary to consider the real nature of the accusation here made, the general history of the events leading up to the making of this accusation, and the character and degree of the proof necessary to sustain it; and into these matters we went at some length; but when we turn to the appellee's brief to ascertain his views upon these topics, we are confronted with nothing which in the slightest degree impeaches the views expressed in our opening brief. We then took up the Osborn stock episode, analyzing the facts and collating the law relevant to those facts; but here, again, a resort to the appellee's brief brings nothing but disappointment to us, at least, for we are there unable to find anything approaching a systematically reasoned discussion of this topic. In our discussion of the acquisition of Section 5, we dealt with such topics as the freedom of a director to acquire real property in his own behalf, the absence of any duty upon a director to loan money to his corporation or purchase property for its use out of his private funds or by the exercise of his private credit, the characteristic conjecturalities of mining, the right of a corporate director to make a fair profit even in his dealings with his own company, the absence of secrecy in Mr. Noyes acquisition of Section 5, his offer of the Section to the company at cost, the futility of claiming that the vouchers for traveling expense establish that the company purchased Section 5, the financial inability of the Company to acquire that section, the utter failure of the complainant to establish that Section 5 was purchased with funds derived from the

Presidio Mining Company, the absence of any right, title, interest, estate and expectancy in the Presidio Mining Company in Section 5, the benefits to the Presidio Mining Company accruing from the acquisition of Section 5 by Mr. Noyes, and the absence of any trust of any character accruing to the company from the acquisition of Section 5 by Mr. Noyes; and we naturally looked for some rational discussion of these various propositions by this appellee—but we looked in vain. Up and down and throughout his brief we find scattered remarks, but nothing approaching a serious and consecutive discussion of these various propositions. We then went into the history of the company subsequent to January 31, 1913, when Mr. Noyes for the first time became a director of the company; we argued the proposition that that history not only exhibits a marked betterment in the company affairs, but also negatives any claim of control or domination by Mr. Noyes of the corporation; and here, too, instead of a systematic presentation, we find what cannot fairly be described as other than sporadic remarks here and there throughout the brief,—remarks quite without continuity or sequence. We then dealt with the question of ratification, with that of laches, and with the matters of injunction and receivership; and upon these matters, as well as upon the other matters mentioned, we find nothing which can be fairly described as of real assistance to a court confronted with the volume of business which is presented here.

Upon a full consideration, then, of this cause, with very great respect, we urge upon this court that the in-

terests of justice will be subserved by so disposing of the merits of this controversy that a decree of this court may be entered reversing the decree of the court below.

Dated, San Francisco,
April 2, 1919.

Respectfully submitted,
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HENRY E. MONROE,
Solicitors for Appellants.

J. J. DUNNE,
Of Counsel.

Addendum.

We desire to correct an omission contained in our original brief at page 283, where we speak of a Colorado case, but through some oversight the case itself was not cited. We desire now to correct that lapse. The case in question is *Mackey v. Burns,* 64 Pac. (Colo.) 485.